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In the

Supreme Court of the United States

of America

THOMAS GILCREASE, - - *Petitioner,*

vs.

G. R. MCCULLOUGH, H. B. MARTIN, A. E. BRADSHAW and AL BROWN, - - - - - - - - - *Respondents.*

25886.

BRIEF OF PETITIONER

Statement of Case

Thomas Gilcrease was a citizen of the Creek Nation of Indians, of less than one-half Indian blood. He received as his allotment of the lands of the Creek Nation, the south half of the northwest quarter, and the north half of the southwest quarter of section twenty-two (22), township seventeen (17) north, range twelve (12) east of the Indian meridian, comprising 160 acres of land in the Creek Nation.

The enrollment records of the Creek Nation show him to have been enrolled on the 9th day of June, 1899, of the age of nine years. That would

have made him 21 years of age on the 9th day of June, 1911.

His guardian made an oil and gas lease on this land, which was approved by the courts, and the Department of the Interior, to one W. H. Millikin, in the year of 1906, the lease to expire on the 8th day of February, 1911. On the 24th day of August, 1909, and in the month of February, 1911, Millikin had drilled forty-two (42) oil wells on this land, which were producing oil and, as Millikin's lease expired February 8, 1911, he had to leave those wells and all casing in them to Gilcrease, the petitioner.

On the 24th day of August, 1909, the petitioner, Gilcrease, in consideration of Seventeen Thousand Dollars ($17,000.00), of which only Four Thousand Dollars ($4,000.00) was paid, executed a lease on this land to defendant G. R. McCullough, having been induced to do so by defendant H. B. Martin, petitioner's attorney.

Later, McCullough reassigned a one-fourth (¼) interest in the lease to petitioner, in consideration of Fifteen Thousand Dollars ($15,000.00), and one-fourth (¼) interest to defendant, H. B. Martin, and one-fourth (¼) interest to defendant, A. E. Bradshaw. Bradshaw paid nothing for his interest and while Martin claims to have paid for his, it is doubtful if he ever paid any consideration at all.

There is evidence in the record that Gilcrease arrived at the actual age of 21 years February 8, 1911, and on that date there was a contract executed by him to defendants McCullough and Martin, stating the interest each held in the lease and giving McCullough and Martin an interest in the casing, equipment and other property on the land, in proportion to the interest claimed by them in the lease. After Gilcrease became of age and became informed that he had been swindled, he brought suit in the District Court of Tulsa County, Oklahoma, to cancel the lease made in August, 1909, and the contract made on February 8, 1911, and acquire title to his land and for an accounting.

We think as clear a statement as we can make of detailed facts is the petition filed by Gilcrease, which is as follows:

State of Oklahoma, Tulsa County, ss. In the District Court: Thomas Gilcrease, Plaintiff, v. G. R. McCullough, H. B. Martin, A. E. Bradshaw, and Al Brown, Defendants.

Petition

Comes the plaintiff, Thomas Gilcrease, and complains of the defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, and for his cause of action states:

That the plaintiff is a citizen by blood of the Creek or Muskogee Nation or Tribe of Indians,

having been enrolled on the tribal rolls of said nation made by the Dawes Commission to the Five Civilized Tribes, June 9, 1899, as of the age of nine years, and of one-eighth degree of Indian blood, opposite Roll Number 1505.

That as such citizen and member of the Creek Nation or Tribe of Indians said plaintiff was entitled, under agreement between the United States of America and the Creek or Muskogee Nation of Indians, embraced in the Act of Congress, approved March 1, 1901, and ratified by the Creek Nation May 25th, 1901, and the Supplemental Agreement between the United States of America, approved June 30th, 1902, ratified by the Creek Nation July 26th, 1902, and proclaimed by the President August 8, 1902, to an allotment of land out of the lands of said Creek Nation, consisting of One Hundred and Twenty acres of Surplus and forty acres of Homestead, and there was duly selected as the surplus allotment of said plaintiff out of the lands belonging to said nation, the following described premises, to-wit:

> South one-half of the northwest quarter, and the northeast quarter of the southwest quarter of Section Twenty-two, Township Seventeen north, of Range Twelve east,

and a patent for said land was duly executed by the Principal Chief of the Creek Nation as provided by law under date of August 25th, 1902, and duly

approved by the Secretary of the Interior of the United States of America, December 15, 1902, and duly recorded in the records of the Commission to the Five Civilized Tribes at Muskogee in Record Book 2, at Page 35, and after having been thus duly executed, approved and recorded, was delivered to this plaintiff, and this plaintiff thereby became vested with an absolute title in and to the land mentioned and described therein, and there was selected as the homestead allotment of said plaintiff out of the lands belonging to said Nation, the following described premises, to-wit:

> The northwest quarter of the southwest quarter of Section Twenty-two, Township 17 north of Range Twelve east,

and that said surplus and homestead contain together one hundred and sixty acres, and all lie and are situated in the County of Tulsa, and State of Oklahoma.

That the defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown are all citizens of the State of Oklahoma, and residents of the City of Tulsa, and County of Tulsa in said State.

That the defendant, G. R. McCullough, is now President of the First National Bank of Tulsa, Oklahoma, and A. E. Bradshaw is now Cashier of the First National Bank of Tulsa, Oklahoma, and that Al Brown is an officer and employee of said First National Bank, but in exactly what capacity

he is employed in said bank this plaintiff has no information and is unable to make exact with any more definiteness than above stated. That prior to his acquisition of his interest in the First National Bank of Tulsa, Oklahoma, G. R. McCullough had been a stockholder and officer in the Bank of Oklahoma, and that A. E. Bradshaw was also a stockholder in and an officer of said Bank of Oklahoma, of Tulsa, Oklahoma, and said McCullough and said Bradshaw acquired large interests in the First National Bank of Tulsa, Oklahoma, and affected a consolidation of the business of the Bank of Oklahoma with the First National Bank of Tulsa, Oklahoma, and said Bank of Oklahoma became merged in said First National Bank of Tulsa, Oklahoma. That the defendant, Al Brown, is now, and has for several years last past been a business associate of said McCullough and Bradshaw. That the defendant, H. B. Martin, is an attorney at law, and has been practicing law in the City of Tulsa, State of Oklahoma, for about four years last passed, and was an attorney for the Bank of Oklahoma prior to its merging with said First National Bank of Tulsa, Oklahoma, and subsequent to the consolidation of said Banks has been an attorney for the First National Bank of Tulsa, Oklahoma.

That prior to the consolidation of the Bank of Oklahoma with the First National Bank of Tulsa, Oklahoma, said Bank of Oklahoma had nationalized and become the Oklahoma National Bank of Tulsa,

Oklahoma, and that the consolidation of said Bank of Oklahoma which had become the Oklahoma National Bank with the First National Bank of Tulsa, Oklahoma, was effectuated during the summer or early fall of the year 1911, the precise date of said consolidation this plaintiff is unable to state.

That during all of the period covered by the transactions hereinafter complained of, all the defendants have been business associates and connected with one another in various business relations.

That the land of the plaintiff hereinbefore described is situated in the oil field which is commonly known as Glen Pool, and is underlaid with a large and valuable deposit of petroleum.

That in the month of September, 1906, after the opening of the Glen Pool field, the plaintiff herein, by and through his father and guardian, William L. Gilcrease, entered into a departmental oil and gas mining lease with one W. H. Millikin, embracing the lands hereinbefore described, and said Millikin proceeded to develop same for oil and to drill upon said land between the fall of the year 1906 and the summer of 1909, in all forty-nine wells upon said lands.

That in August of 1909, forty-two of said wells were producing wells, and there was being produced from said land more than twenty-five thousand barrels of oil per month.

That this plaintiff was then a minor, inexperienced in all business affairs, and without any knowledge of the real value of the property involved in this controversy.

That the defendants herein were all men of mature judgment, wide business experience, and extensive knowledge of the conditions existing in the Glen Pool field, and of extensive and accurate knowledge of oil properties situated in said field, and well knew the conditions and value of the particular property involved in this controversy, and were all acquainted with its enormous value as an oil property.

That all of said defendants were well acquainted with this plaintiff and with his situation; with his want of age and experience, and knew that he had in fact no knowledge of the real value of his property, and that he was without business experience, judgment, capacity and discernment to deal with them or with others in regard thereto.

This plaintiff further avers that the defendants herein, and each of them, were well acquainted with the forms of departmental oil and gas mining leases upon the lands of Indian Allottees of the Creek Nation, and were well acquainted with the terms of such leases and of the lease made by the guardian of this plaintiff with William H. Millikin, covering the lands hereinbefore described, and that said lease among its other terms contained the pro-

visions that at its expiration on February 8, 1911, the lessee was to leave upon the premises all of the casing in each of the producing wells which he had drilled thereon, and that said wells so drilled and cased were worth to the property under the condition which by the terms of said lease with Millikin they were to be left at the expiration thereof, and added more than one hundred thousand dollars to the value of the property, and that the value of said property at the date of the expiration of the lease with Millikin would be more than three hundred thousand dollars, and also well knew that by reason of the youth, inexperience and want of business experience, and want of judgment of the plaintiff herein the said plaintiff was not aware of the actual value of said property.

That sometime prior to the 24th day of August, 1909, the defendant, H. B. Martin, had been the regular retained and paid attorney of the plaintiff in this cause, and that said defendant, H. B. Martin, was at that time a member of the firm of Hainer & Martin, regular practicing attorneys of the City of Tulsa, Oklahoma, and that on or about the first day of January, 1909, the plaintiff herein had regularly employed and retained said firm of attorneys to counsel and advise him and to attend to his legal business; to collect monies that were due him from rents and royalties accruing from the land hereinbefore described, and to advise and direct him in the management of his business affairs generally.

That the defendant, H. B. Martin, while a member of the firm of Hainer & Martin, and while so retained and employed by this plaintiff had familiarized himself with the business affairs of the plaintiff and particularly with reference to the property in question in this suit, and the development of said property under the oil and gas mining lease hereinbefore referred to.

That the plaintiff reposed utmost confidence in the business judgment, faithfulness, integrity and ability of said attorney, H. B. Martin, and made the office of said defendant, Martin, his headquarters from about the first day of January, 1909, and continued to make such office his headquarters during all of the times hereinafter mentioned, and that during said period, this plaintiff was so thoroughly under the direction of said H. B. Martin and reposed such confidence in him, and in his advice, that he was willing to do almost without question anything that was counselled and directed by said Martin or anything the said Martin said was right or proper for him to do.

That the plaintiff was conscious of his own want of personal experience, business judgment and ability, and relied implicitly upon the judgment, advice, suggestion and directions of said attorney, H. B. Martin, and such confidence in and dependence upon said attorney on the part of the plaintiff was well known to each and all of the defendants herein.

That said defendants, knowing the status and value of the properties hereinbefore described, and well knowing the situation of the plaintiff in this cause with reference to his attorney, H. B. Martin, and knowing his want of business judgment and discretion, and his want of knowledge of the actual value of the property, and all of the facts herein set out, and they being desirous to possess themselves of this valuable piece of land, and to enjoy the wealth which it was producing, and would for a long period of time continue to produce, at some time prior to the 24th day of August, A. D. 1909, formed a conspiracy to defraud the plaintiff out of said property for a mere fraction of its real value, and entered upon a conspiracy and agreement to do and perform all things which might become necessary to effectuate that purpose and to do and perform all things which are herein set out and complained of, and for the purpose of effectuating said design and carrying out said conspiracy, they did on or about the 24th day of August, A. D. 1909, and while the plaintiff herein was still a minor, and incapable of making any valid lease of oil and gas mining properties or other contract with reference to the land hereinbefore described, procure the plaintiff to make and enter into an apparent oil and gas mining lease covering the lands hereinbefore described to begin at the expiration or cancellation of the William H. Millikin lease hereinbefore referred to, providing for a royalty of

one-eighth of all oil produced and saved from said premises and one hundred dollars for the product of each and every gas well while same was being sold off the premises, and which apparent oil and gas mining lease appears of record in the office of the Register of Deeds in Book 70, at page 10, and a copy of which is attached to this petition, marked exhibit "A," and made a part hereof, to the same effect as if said instrument was set out in full in this complaint, and that it was the understanding and agreement at the date of the execution of said pretended lease above set out that whenever this plaintiff should become of lawful age, he was to execute an oil and gas mining lease and to receive a cash consideration therefor of Seventeen Thousand Dollars in money, and a royalty of one-eighth of all oil produced from the premises.

That all of the negotiations at the time of making of said pretended lease above set out were made with the defendant, A. E. Bradshaw, by and through the defendant, H. B. Martin, he, the said Martin, being at the time the regularly retained, paid and acting attorney of this plaintiff, and that said H. B. Martin actually prepared the lease hereinbefore referred to as exhibit "A," and made a part of this petition, and during all said negotiations, so advised this plaintiff and counselled with him in regard thereto, and then and there well

knowing that said property was of the value as hereinbefore alleged, stated and represented to the plaintiff that a bonus of Seventeen Thousand Dollars and a royalty of one-eighth of the oil produced from said premises was the best price that could be obtained for the same, and was all that said property and premises were worth, and that said defendant, H. B. Martin, made said representations to the plaintiff for the purpose of inducing him to subscribe said paper writing thereby putting himself in a position where he would be *prima facie* lessor of said premises, and apparently bound to the defendant, Grant R. McCullough.

That at the time the defendant, H. B. Martin, and all of the other defendants, well knew that the actual value of a valid lease upon said property in a form as the one signed by the plaintiff to said Grant R. McCullough, was at least Three Hundred Thousand Dollars, and that the representations made by the defendant Martin to the plaintiff were at the instigation of, and with the knowledge of, and concurrence therein of the other defendants, and were made for the purpose of inducing the plaintiff to sign said paper writing, thereby putting himself in the position where he would be apparently bound, and effectuating their final consummation of their design to strip him of his property for a mere fraction of its value.

That the defendant herein well knew that the paper writing of August 24th, 1909, hereinbefore

set forth as exhibit "A," was not a valid instrument in law, but they also knew that the plaintiff was unaware of the want of validity in said instrument because of said reliance upon the counsel and advice and direction of his attorney, H. B. Martin.

That prior to the 24th day of August, 1909, and to-wit: on the 18th day of September, 1908, the plaintiff had executed a warranty deed for the lands hereinbefore described to his mother, Lizzie Gilcrease, which deed was duly recorded in the office of the Register of Deeds in Record Book 33, at page 529, in Tulsa County, Oklahoma, and so appeared of record on the 24th day of August, 1909, but that said conveyance or attempted conveyance to Lizzie Gilcrease was understood by the plaintiff in this cause and by said Lizzie Gilcrease and by all the defendants herein as being simply in trust for the plaintiff, and the defendants knew that the plaintiff had from said Lizzie Gilcrease a declaration of trust, and a deed, but that the defendants in furtherance of their design, and for the purpose of so clouding the title of the plaintiff to said land as to make it as difficult as possible for him to recede therefrom, they procured the execution by said Lizzie Gilcrease to the defendant, Grant R. McCullough, on the 4th day of September, 1909, of a pretended oil and gas mining lease upon the property hereinbefore described, the recited consideration named in said pretended lease being the consideration named in the lease of August 24th, 1909, from

the plaintiff to said Grant R. McCullough, and no other consideration whatever in fact being given, and further reciting that said Lizzie Gilcrease adopted, ratified and confirmed said lease from Thomas Gilcrease to Grant R. McCullough, a copy of said pretended oil and gas mining lease from Lizzie Gilcrease to Grant R. McCullough of September 4th, 1909, is attached to this petition, marked exhibit "B," and made a part of this petition.

That said pretended oil and gas mining lease above set forth as exhibit "B," was prepared by the defendant, H. B. Martin, who was at the time duly retained, paid and acting attorney of the plaintiff, and the said Lizzie Gilcrease being at that time at the town of Eureka Springs in the State of Arkansas, said Martin made a trip to Eureka Springs and procured said Lizzie Gilcrease to sign and execute and deliver said paper writing, all of which was done by the defendant Martin with the knowledge and consent at the instance of the other defendants herein, and done as a part and parcel of the conspiracy formed and entered into by and between the defendants herein, and for the purpose of carrying out said design and conspiracy, and accomplishing their purposes of obtaining the property of the plaintiff hereinbefore described for a nominal consideration, which would be but a fraction of its real value.

That in furtherance of said conspiracy, the defendants on or about the 12th day of April, 1910, procured the appointment of A. E. Bradshaw as guardian of the plaintiff, the application for said appointment being made to the County Court of Tulsa County, Oklahoma, said application being made by the defendant, A. E. Bradshaw, and the defendant, Bradshaw, being represented therein by the defendant, H. B. Martin, and said H. B. Martin being at the time the regularly retained and paid attorney of the plaintiff herein, and that in order to procure the appointment of said A. E. Bradshaw as such guardian, the defendant procured from the father of the plaintiff his written consent to such appointment and waiver of the right to act as such guardian.

That thereafter, and on or about the 21st day of April, 1910, in furtherance of said conspiracy, and for the purpose of continuing the relationship between the plaintiff herein and the defendant Martin and other defendants, said defendant Martin procured from the plaintiff herein a written contract of employment wherein and whereby the said defendant Martin, although still a member of the firm of Hainer & Martin, was employed individually as the attorney of the plaintiff to represent him in general in and about all of his litigation, and all business affairs for the term of one year from the 21st day of April, 1910, which contract was made and entered into with full knowledge of the other

defendants herein. A copy of which contract is hereto attached, marked exhibit "C," and made a part hereof.

That or or about the 22nd day of October, 1910, the plaintiff applied to the defendants for a release from the apparent contract and agreement which he had entered into and hereinbefore set forth, and which stood in the name of the defendant, Grant R. McCullough, but which was in reality for the benefit of all the defendants, and upon the defendants refusing to release said pretended contract, he counselled with his attorney, H. B. Martin, in whom he still reposed the utmost confidence, and who was still in his employ, and regularly retained and paid by the plaintiff, and was advised by his said attorney that he would be compelled to carry out said pretended contract whether he wished to do so or not, and that he was bound thereby, although in truth and in fact said defendant Martin well knew that said pretended contract was not valid in law, and could not be enforced, and was not binding on the plaintiff but said Martin advised the plaintiff that he would be compelled to carry out said contract as a part of the fraudulent and corrupt design previously formed by the defendants herein of obtaining the property of the plaintiff, and said defendant Martin further advised the plaintiff that if he could procure a part of said contract, the best thing for the plaintiff to do was to take back from Grant R. McCullough an assignment of a half in-

terest in the same for the sum of Thirty Thousand Dollars, and in order to induce into the mind of said plaintiff that he, Martin, was acting in perfect good faith, and to continue his domination over the plaintiff, and over the judgment of the plaintiff, said to him, that he, Martin, would take a half interest in said half. In other words, that they would each take an assignment of one-fourth interest from McCullough, and each pay fifteen thousand dollars therefor.

That the plaintiff still reposing confidence in his said attorney, and still being dominated by him, and still relying on such attorney's integrity and sound business judgment, and ability, and on the representations so false and fraudulently made by said defendant Martin for the purpose of carrying out the conspiracy herein alleged, the plaintiff acceded to said Martin's suggestion and representations, and it was agreed that said Grant R. McCullough should assign to the plaintiff a one-fourth interest in his pretended lease, and to the defendant, H. B. Martin, a one-fourth interest in said pretended lease, and that the plaintiff should pay for such one-fourth interest the sum of fifteen thousand dollars, and H. B. Martin should pay for such one-fourth interest a like sum of fifteen thousand dollars.

That previous to the 22nd day of October, 1910, the defendants had paid to this plaintiff the sum

of four thousand dollars of the seventeen thousand dollars which they had on the 24th day of August, 1909, agreed to pay for the lease upon said premises, leaving still due to the plaintiff according to the terms of the pretended lease of August 24th, 1909, and the contract and agreement under which same was made, the sum of thirteen thousand dollars, and this plaintiff relying upon the representations of the defendants, and particularly of the defendant, H. B. Martin, his attorney, paid over to Grant R. McCullough the sum of two thousand dollars in money, being the difference between said thirteen thousand dollars and the sum of fifteen thousand dollars, and which he, the plaintiff was to pay for such one-fourth interest, and said transaction being in full satisfaction of all balance and remainder of the seventeen thousand dollars agreed to be paid the plaintiff under the lease of August 24th, 1909.

That although the defendant, H. B. Martin, represented that he was paying a like sum of fifteen thousand dollars to the defendant, Grant R. McCullough, for an assignment of the one-fourth interest in the lease upon the premises hereinbefore described, said Martin did not in fact pay said sum of money or any other sum for the assignment to him by McCullough of the one-fourth interest to said Martin, and said McCullough for the purpose of carrying out their design, fraudulently represented to the plaintiff that said payment of fifteen

thousand dollars was actually made by Martin, and that McCullough had actually assigned to Martin a one-fourth interest in said leasehold estate, all of which representations the plaintiff herein at the time believed and relied on and continued to believe up until a few days previous to the filing of this petition.

That, thereafter, and to-wit: on the 8th day of February, 1911, which was the day on which it was understood by all the parties that the William H. Millikin lease hereinbefore referred to expired, the defendants herein in furtherance of the conspiracy and design hereinbefore alleged, and while the defendant, A. E. Bradshaw, was still acting as the guardian of this plaintiff, never having been discharged by the court by which he was appointed or any other court, and while the defendant, H. B. Martin, was still retained, paid and acting as the attorney of the plaintiff, and while the closest business intimacy still existed between all of the defendants, and while the plaintiff was still relying upon the good faith of his guardian and of his counsel, and under the influence of his counsel and guardian, and while the plaintiff still believed the representations to him made by his attorney, Martin, and that he was bound by his former agreement with the defendant, Grant R. McCullough, and that Grant R. McCullough owned a one-half interest in the lease upon the premises, and that the plaintiff owned a one-fourth interest therein, and that

the defendant, H. B. Martin, owned the other one-fourth interest therein, and while the plaintiff was still unadvised of the actual value of the property and of the lease upon same, and was still without business experience and judgment necessary to enable him to appreciate the character of the transaction upon which he was about to enter, and while the plaintiff was still under the influence of the representations in regard thereto, which had been made to him by his counsel, guardian and the other defendants, and while the plaintiff was still incapable of making an oil and gas mining lease except through a duly appointed guardian, properly authorized thereunto by an order of the probate court by reason of the following Acts of Congress, to-wit: Section Seventeen of the Act of Congress of June 30th, 1902, commonly known as the Supplemental Agreement, which is in words and figures as follows:

> "Any lease for mineral purposes may also be made with the approval of the Secretary of Interior and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void, and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

and of Section Four of the Act of Congress of March 1st, 1901, which is in words and figures as follows, to-wit:

> "Allotments for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority."

and also the Act of Congress of April 28th, 1904, Section Two whereof provides as follows:

> "And full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, Freedmen, or otherwise."

and also of the Act of Congress of March 3rd, 1905, Section One whereof provides:

> "No lease made by any administrator, executor, guardian or curator shall be valid or enforcible without the approval of the court having jurisdiction of the proceeding."

and also Section 19 of the Act of Congress of April 26th, 1905, which provides as follows:

> "And every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions be and the same is hereby declared void"

and also of Section 20, which provides:

> "That allotments of minors and incompetents may be rented or leased under order of the proper court"

and also Section 2, 3, 5 and 6 of the Act of Con-

gress approved May 27th, 1908, in words and figures as follows, to-wit:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by the guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed _____ years, without privilege of renewal; Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; And provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years."

Section 3:

> "That no oil, gas or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior, as if this Act had not been passed,"

all of which was known to the defendants, and the actual value of the property at the time being also known to the defendants, and the value of the wells upon the property being well known to the defendants, and it being well known by them to be of the value of not less than three hundred thousand dollars, the defendants fraudulently and corruptly induced the plaintiff, as the final step in the consummation of the conspiracy and design which they had entered into, to execute and deliver to them a certain paper writing purporting to be an oil and gas mining lease upon the terms hereinbefore described, for a royalty of one-eighth of the oil mined and saved from said premises and purported to vest in Grant R. McCullough a one-half interest, in the plaintiff, Thomas Gilcrease, a one-fourth interest, and the defendant, H. B. Martin, a one-fourth interest. A copy of said lease or contract is attached hereto, marked exhibit "D," and made a part hereof.

That by the terms of said contract or lease of February 8th, 1911, the defendant, Grant R. McCullough, purported to become the owner of one-half of the equipment on said premises, and the defendant, H. B. Martin, of one-fourth interest in said equipment then on said premises.

That the casing and lining in the forty-two wells upon the premises at that date was worth more than thirty-six thousand dollars. In other words,

more than twice the amount of the bonus originally promised and agreed to be paid by the defendants to the plaintiff for the entire lease upon the whole premises with forty-two producing wells situated thereon.

That upon the execution of the lease of February 8th, 1911, hereinbefore referred to as exhibit "D," the defendants procured the plaintiff to execute his note to the First National Bank of Tulsa, Oklahoma, for the sum of one thousand dollars to procure money for the purpose of employing hands and working the lease in question, and to purchase the necessary pumps, machinery and equipment for use upon said premises, and did not themselves invest or expend a single dollar in the development, equipment or working of said property, but bought all of the machinery which was bought for said premises on a credit and it was paid for out of the production from said premises, and that said property has produced and the defendants have taken therefrom since the 8th day of February, 1911, and there has been produced and saved from said premises and marketed and sold therefrom one hundred and seventy-five thousand barrels of oil of the value of seventy-two thousand dollars, and that out of said production, the plaintiff has received only the royalty of one-eighth, plus one-fourth of the remainder after there was paid therefrom the operating expenses and amounts for the machinery and equipment to work said lease, and

the defendants have received the other three-fourths of the proceeds of said lease over and above the royalty.

That on or about the 11th day of December, 1911, the defendant, H. B. Martin, offered to convey and did convey to this plaintiff for a valuable consideration in money and property then paid and delivered to the said H. B. Martin, amounting to the sum of thirty-one thousand dollars, and assigned and transferred to the plaintiff, three-fourths of the interest then held and claimed by said Martin in said lease, and that said H. B. Martin had previously by an assignment which appears of record in the office of the Register of Deeds of Tulsa County, Oklahoma, conveyed to the defendant, G. R. McCullough, who is the same person as Grant R. McCullough referred to herein, a one-fourth part of the interest claimed by Martin in said lease, which would be one-sixteenth interest in the entire lease. A copy of said assignment from Martin to Gilcrease is hereto attached, marked exhibit "E," and made a part hereof, and a copy of said assignment from Martin to McCullough is hereto attached marker exhibit "F."

That the defendants have since the 8th day of February, 1911, derived from sales of oil taken from said premises and appropriated to their own use that which was legally and equitably the property of this plaintiff, and the defendants, nor either

of the defendants, had any right, title or interest or any right thereto.

That the defendant, Al Brown, claims an interest in said lease, but the particular nature and character and extent of said interest this plaintiff is unable to state, nor is the plaintiff able to allege what proportion of the monies derived from the sale of oil taken from said premises since February 8th, 1911, said defendent, Al Brown, has received and appropriated to his own use.

That as hereinbefore stated and alleged, the only sum or amount ever paid by these defendants or either of them for the apparent lease obtained by them from the plaintiff through fraud and undue influence herein alleged and recited, was the sum of four thousand dollars, two thousand dollars of which has been repaid by the plaintiff in money and the other two thousand dollars of which has been paid over many times by monies drived by the defendants from the sale of oil taken by them from said property, so that there is now due from this plaintiff to the defendant nothing whatsoever, but on the contrary the defendants are indebted to the plaintiff in a sum exceeding thirty thousand dollars for and on account of money which they have had and received as proceeds from the sale of oil taken from the premises and by them appropriated to their own use and benefit, and by virtue of the fraudulent practices hereinbefore recited;

and the plaintiff has not received a dollar of the defendants, but if it shall turn out that the plaintiff is mistaken in this, or if it shall be adjudged and determined that any sum is due from the plaintiff to the defendants, or either of them on account of the matter and things herein alleged and stated, the plaintiff now and here offers to return and to repay to said defendants or such of them as the court may adjudge is entitled to receive same any such sum or sums as the court shall find such defendant or defendants entitled to, and to do full and complete equity in the premises, and hereby submits himself fully to the jurisdiction of this court, and prays that an accounting be had between him and said defendants, and offers to do whatsoever shall be adjudged by the court to be right and proper for him to perform, but in the end that he may have cancellation and rescission of the pretended contract now held by the defendants and under which they claim the premises in question, and upon which the oil is being taken and produced therefrom, and asks that the defendants and each of them be required to account fully for all oil or substances taken from said premises under said contract, and for all monies that they have derived by reason of the same.

That at the time the plaintiff obtained the assignment from the defendant, H. B. Martin, of three-sixteenths interest in the lease of February 8, 1911, being three-fourths of the interest in said lease

claimed by said Martin, he paid said Martin by surrendering to said Martin promissory notes theretofore given by said Martin to said plaintiff for five thousand dollars, and cancelled an open account owed by said Martin to the plaintiff for borrowed money to an amount of thirty-five hundred dollars, an dtransferred to said Martin one promissory note, executed by George W. Rose to the plaintiff for the sum of three thousand dollars, secured by real estate mortgage, and also one note executed by S. C. Maxey and wife to the plaintiff or the sum of fifteen hundred dollars, secured by mortgage on real estate, and executed to said H. B. Martin, deed of conveyance for the following described real estate situated in Tulsa, and Osage Counties in the State of Oklahoma, to-wit:

One deed for the south 50 feet of Lot 4, Block 183, one deed for the east 37½ feet of Lot 12, Block 1, in Bliss Addition, one deed for Lot 1, Block 2, Brennan Reed Addition, and one deed for Lots 6, 7, 8, 9, 10 and 11, in Block 3 of Northmoreland Addition. Tulsa, Tulsa County, Oklahoma, and one deed to the southeast quarter of Section 25, Township 17 North, Range 12 east, in Tulsa County, Oklahoma, and one deed to the NW¼ of Section 17, Township 20 north, Range 12 east, and the SW¼ of the SW¼ of Section 20, Township 20 north, Range 12 east, Osage County, Oklahoma.

That said payments, transfers and conveyances by the plaintiff to the defendant, Martin, were

wholly without any consideration for the reason that the alleged and apparent interest in the lease aforesaid, was acquired by him as a result of the conspiracy entered into and carried out by the defendants as herein stated, and obtained from this plaintiff by fraudulent practice herein set out, and the apparent consideration given by Martin to the plaintiff of thirty-one thousand dollars above mentioned was in truth and in fact but a return from said Martin of all the property and all of the value received by the defendant, Martin, from the plaintiff at the time of the transaction whereby Martin assumed to assign to the plaintiff three-sixteenths of the lease of February 8, 1911, and obtained from the plaintiff thirty-one thousand dollars in choses in action and real estate.

That the property described herein is still producing large quantities of oil, to-wit, more than fifteen thousand barrels per month, and the monthly production is of the value of nine thousand dollars taking the present market price. That the defendants or some of them are continuing to receive, and are appropriating to their own use nine-sixteenths of the proceeds of the sales of oil produced from said premises, and that the plaintiff, although the rightful owner of all of said oil, has only received from said property seven-sixteenths of the proceeds of the sales of the oil therefrom after deducting the operating expenses plus his royalties of one-eighth of the entire production, and that the de-

fendants, unless restrained by proper order of this court, will continue to produce oil from said premises and to appropriate nine-sixteenths of the oil so produced after deducting one-eighth royalty therefrom to their own use and benefit, and that it is necessary for the best interest of said property that oil continue to be produced therefrom, and that the operation of the wells upon said land be continued and oil taken therefrom, and to this end that some competent person be appointed receiver to take and receive and hold subject to the order of this court all that portion of the oil produced from said premises over and above the one-eighth royalty which by the terms of the instrument set out to be cancelled by this suit is due the plaintiff, and the seven-sixteenths of the production from said premises which by the terms of said instrument this plaintiff is entitled to have and receive, and which the defendants admit the plaintiff is entitled to receive.

That unless the property involved in this suit is continuously operated, that is to say, if said forty-two producing wells upon the premises described in this petition are shut down and oil not taken from them, such action will produce great damage to the property, and the property will never again be worth as much after such wells are shut down as before they were so shut down.

Whereas, on the other hand, if the defendants are allowed to continue the operation of said prop-

erty and to continue to take oil therefrom, they will continue to sell and dispose of same, and to appropriate nine-sixteenths of the proceeds to their own use and benefit, and the total amount of the oil in and under said premises will to that extent be damaged, and the only remedy which will be left to this plaintiff if he prevails in this cause will be a personal judgment for the value of the oil so taken by them and appropriated by them and appropriated to their own use, and the value sought to be recovered by the plaintiff herein will be greatly diminished.

Plaintiff further states to the court that both of the defendants, Al Brown and E. A. Bradshaw, are now and have at all times been parties to the conspiracy herein alleged and set forth, and to the various acts and things that have been done in furtherance thereof, and have had full knowledge of all that has been done in the carrying out of said conspiracy, participating in the intent thereof, and in the fraud thereof, and are now claiming and asserting some right and interest in and to the property in question by virtue of contracts and leases herein set out and referred to, and which stand on the record in the name of the defendant, G. R. McCullough and H. B. Martin, but that the precise extent of the interest of each of such defendants is unknown to the plaintiff as is also the precise nature of the instruments or contracts, promises or agreements under which they are holding or claiming

an niterest in said property, but all of the apparent claims and interests of said defendants, Bradshaw and Brown, as of the other defendants, are wholly fraudulent for and by reason of the matters and things in this petition set out.

Plaintiff further states that he did not at any time prior to the first day of February, 1912, know of the conspiracy between the defendants herein or of the interest in the said lease of said guardian, nor of said Al Brown, nor that the defendant Martin had not paid the fifteen thousand dollars for the one-fourth interest in said lease, nor was he at any time prior to that date conscious of any of the frauds or undue influence of said Martin, and of said guardian or of any of the defendants herein, and had plaintiff known any of said facts, he would not have executed any of said instruments.

PREMISES CONSIDERED, PLAINTIFF PRAYS:

First: That the defendants and each of them be required by proper order of this court to refrain from the sale or disposition of any oil now on hand taken from said premises described herein, or which they are now taking from said premises which may be taken by them from said premises at any time during the pendency of this litigation, and from receiving the proceeds of any oil which may have been taken from said premises and sold to any person, firm or corporation, or now in the pipe line of any such person, firm or corporation, and for

which they have not yet received payment.

Second: That some discreet and competent person, competent to manage and operate said lease be appointed receiver to take charge of nine-sixteenths interest in the leasehold upon the premises described herein, now claimed by all the defendants and which nine-sixteenths interest the plaintiff claims in equity and good conscience to be his property, and which he is seeking to recover in this cause by cancellation of the instrument under which the defendants are claiming title to same, and that said receiver be empowered and authorized to market said nine-sixteenths of the whole amount of oil taken from said premises over and above the royalty and operating expenses, and to collect and receive monies derived from the sale thereof, and to hold same subject to the order and disposition of this court, and also to market that portion of any oil on hand at the filing of this suit which would be the part thereof claimed by the defendants under the instrument, the cancellation of which is sought in this action, and to receive money for the same and hold said money subject to the order and disposition of this court, and also to collect and receive pay for the portion of any oil now in the hands of any person or company and claimed by the defendants which would have been coming to the defendants had this suit not been instituted, and to hold all of said monies subject to the order of this court, and to do such other and further

things as the court shall by its order of appointment or any order subsequently made thereto, and to join with the plaintiff herein the operation of said premises, and to do and perform all such acts in furtherance thereof and in relation to said premises and the property as will protect the rights of all parties hereto under the authority and direction of this court by its order of appointment and such other and further order as the court shall from time to time make.

Third: That the defendants and each of them be required to answer this bill of complaint and to show, but not under oath, answer under oath being hereby expressly waived, what amount of oil has been taken from the premises by them since the 8th day of February, 1911, exactly what amount has been expended by them for the equipment and for operating expenses, and exactly what sum they and each of them have derived and received from said proceeds in sales of oils taken from said premises, over and above the one-eighth royalty paid to the plaintiff, and to state and set forth such sums and portions as may have been paid by the plaintiff as his admitted share of the transaction from the lands and premises described herein, and generally to account to this plaintiff for any and all sums of money, all property, assets and values of every description that they or each of them have received from the premises mentioned and described in this petition or from or by virtue of any of the trans-

actions herein complained of, to the end that proper amount which may be due from each of said defendants to the plaintiff for and on account of said matters and things may be ascertained and determined and that upon such accounting, the plaintiff have judgment against said defendants and each of them for any and all sums which may be shown to have been received and obtained by them.

Fourth: That the court decree the cancellation of each and every of the several instruments under and by virtue of which the defendants herein or either of them are claiming and asserting any right, title or interest in or to the premises in controversy, or the oil or gas in and under said premises, or any leasehold interest therein or thereto, or any right to mine and to take oil and gas therefrom, and particularly that this court by its decree cancel, set aside and hold for naught the apparent lease of the plaintiff to the defendant, Grant R. McCullough, dated August 24th, 1909, and the pretended lease of Lizzie Gilcrease to Grant R. McCullough of September 5, 1911, and the pretended lease of Thomas Gilcrease to H. B. Martin and G. R. McCullough of February 8th, 1911, and the pretended assignment of H. B. Martin to G. R. McCullough of March 23rd, 1911, and that each and every one of said instruments be declared null and void, and the defendants and each of them and all persons claiming by, through or under them, or either of them, be forever enjoined from asserting any

right, title, interest or claim in and to said premises or any oil under said premises, under and by virtue of any or either of said pretended contract, leases, assignments and agreements, and that the title of the plaintiff in and to the premises hereinbefore described and the oil and gas therein and thereunder be quieted against the pretended interests of each and all of the defendants herein.

Fifth: That the defendant, H. B. Martin, be required to restore and refund to the plaintiff all the property acquired from the plaintiff under and by virtue of the transaction of December 11, 1911, hereinbefore particularly set out, and to repay to the plaintiff the amount for which said defendant Martin received credit on his note and indebtedness, and if he has not converted into money the choses in action delivered by the plaintiff to him, being made by third parties secured by real estate mortgages, that said notes be required to be by said defendant Martin returned and reassigned to the plaintiff, and that as to all of the real estate conveyed by the plaintiff to Martin, that the said conveyances from the plaintiff to Martin be cancelled, set aside and held for naught, and the title thereof reinvest in the plaintiff as fully and to the same extent as if any conveyances whatsoever had never been made by him to the defendant, Martin, and if it appears that any of said real estate or choses in action has been disposed of by said Martin so that it cannot be restored in kind or the title there-

to reinvested in the plaintiff, that the defendant Martin, be required to repay to the plaintiff the value thereof, and that any receiver appointed for the disputed portion of the oil involved in this cause be also authorized and directed to take charge of any of the choses in action transferred by the plaintiff to the defendant Martin during the pendency of this litigation, and to collect and receive from the debtors in said choses in action sums of money evidenced by the same or any part thereof remaining unpaid, and to do and perform any and all things necessary therein, and to hold the proceeds thereof subject to the order and discretion of this court.

Sixth: That the court make and enter any such further decree and make all such other and further orders herein as may be, and which the court shall in equity and good conscience deem proper.

P. C. WEST AND
BIDDISON & CAMPBELL,
Attorneys for Plaintiff.

State of Oklahoma, Tulsa County, ss:

Thomas Gilcrease of lawful age being first duly sworn on his oath states that he has read the above and foregoing petition, knows the contents thereof, and that the statements and allegations therein contained are true.

THOMAS GILCREASE.

Subscribed and sworn to before me this 14th day of February, 1912, W. W. Stuckey, Clerk District Court, by J. Q. Chambers, Deputy.

EXHIBIT "A."

Oil and Gas Mining Lease.

This Agreement, Made this 24th day of August, 1909, by and between Thomas Gilcrease, party of the first part, and Grant R. McCullough, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of seventeen thousand ($17,000.00) dollars, the receipt of which is hereby acknowledged, and for the further consideration of the rents, covenants and agreements hereinafter provided, has granted, demised, let and leased and does by these presents, grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns all the oil and gas in and under that certain tract of land hereinafter described and also all the said tract of land hereinafter described, for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened and operated upon said land and as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa County, State of Oklahoma, and described as follows, to-wit:

The south half (½) of the northwest quarter (¼) and the north half (½) of the southwest quarter of Section twenty-two (22), Township seventeen (17) north of Range twelve (12) east of the Indian Meridian, containing 160 acres.

The said party of the first part grants the further privilege unto the party of the second part, his heirs, successors and assigns, of using sufficient water and gas from the premises necessary to the operations thereon, and all rights and privileges necessary or convenient for conducting said operations, and the transportation of oil and gas, and gas, and the right to remove at any time, machinery or fixtures placed on the premises by said party of the second part.

To Have and to Hold the Same unto the said party of the second part, his heirs, successors and assigns, for the term of fifteen years and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The term of this lease to begin at the time of the expiration or cancellation of a certain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Millikin, and the said term of this lease shall run for fifteen years thereafter and as long thereafter as oil and gas is being produced as aforesaid.

In consideration whereof, the said party of the second part agrees to deliver to the party of the

first part, in tanks or pipe lines, the one-eighth (1/8) part of all oil produced and saved from the leased premises. And should gas be found on said premises in paying quantities, said party of the second part agrees to pay one hundred ($100.00) dollars yearly for the product of each gas well while the same is being sold off the premises, but the party of the second part shall have the right to use sufficient gas, oil and water to drill all wells and for all purposes necessary or convenient in operating the same.

All rentals and other payments may be made directly to the party of the first part, or may be deposited to his credit at the Bank of Oklahoma in the City of Tulsa.

All the conditions and terms of this grant and lease shall extend to and be binding upon the heirs, successors and assigns of the parties hereto.

In Witness Whereof, We have hereunto set our hands this 24th day of August, 1909.

THOS. GILCREASE,
Party of the First Part.

GRANT R. MCCULLOUGH,
Party of the Second Part.

State of Oklahoma, County of Tulsa, ss:

On this 24th day of August, 1909, before me, A. B. Davis, a Notary Public in and for said County and State, personally appeared Thomas Gilcrease,

to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein named.

Witness my hand and official seal this 24th day of August, 1909. A. B. Davis, Notary Public. My commission expires November 26, 1911.

EXHIBIT "B."

Oil and Gas Mining Lease.

This Agreement, Made and entered into on the 4th day of September, 1909, by and between Lizzie Gilcrease, party of the first part, and Grant R. McCullough, party of the second part,

Witnesseth, That said party of the first part, for and in consideration of the sum of One ($1.00) Dollar, and other good and valuable considerations, the receipt of which is hereby acknowledged and for the further consideration of the rents, covenants and agreements hereinafter provided, has granted, demised, let and leased, and does by these presents, grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns, all the oil and gas in and under the said tract of land hereinafter described, for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened

and operated upon said land and as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa County, State of Oklahoma, and described as follows, to-wit:

The south one-half (½) of the northwest quarter (¼) and the north one-half (½) of the southwest quarter (¼) of Section Twenty-two (22), Township Seventeen (17) north of Range Twelve (12) east of the Indian Base and Meridian, containing One hundred and Sixty (160) acres more or less.

The said party of the first part grants the further right and privilege unto the party of the second part, his heirs, successors and assigns, of using sufficient water and gas from the premises necessary to the operation thereon, and all rights and privileges necessory or convenient for conducting said operations and the transportation of oil and gas, and the right to remove at any time machinery or fixtures placed on the premises by the said party of the second part.

To Have and to Told the Same, unto the said party of the second part, his heirs, successors and assigns, for the term of Fifteen (15) years, and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The term of this lease to begin at the expiration or cancellation of a cer-

tain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Millikin, and the said term of this lease shall run for fifteen (15) years and as long thereafter as oil or gas is being produced as aforesaid.

The consideration named in a certain lease upon the aforesaid lands heretofore executed on the 24th day of August, 1909, by Thomas Gilcrease, to the said Grant R. McCullough consisting of a bonus of Seventeen Thousand ($17,000.00) Dollars, and a royalty of one-eighth (1/8) of the oil to be produced from said land as a part of the consideration of this lease. And the said party of the first part, Lizzie Gilcrease, hereby adopts, ratifies and confirms the said lease from Thomas Gilcrease to the said Grant R. McCullough.

All conditions and terms of this grant and lease shall extend to and be binding upon the heirs, successors and assigns of the parties hereto.

In Witness Whereof, We have hereunto set our hands this 4th day of September, 1909.

LIZZIE GILCREASE,
Party of the First Part.

GRANT R. MCCULLOUGH,
Party of the Second Part.

State of Oklahoma, County of Tulsa, ss:

On this 4th day of September, 1909, before me,

a Notary Public in and for said county and state, personally appeared Lizzie Gilcrease, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that she executed the same as her free and voluntary act and deed, for the uses and purposes therein named.

Witness my hand and official seal this 4th day of September, 1909. C. W. Gillett, Notary Public. My commission expires April 12, 1912.

EXHIBIT "C."

Contract.

This contract made and entered into on this 21st day of April, 1910, by and between Thomas Gilcrease, party of the first part, and H. B. Martin, party of the second part,

Witnesseth: That this contract is made to take the place of and supersede a certain contract heretofore entered into on the 1st day of February, 1909, by and between Thomas Gilcrease and the firm of Hainer & Martin, and,

It is contracted and agreed that the said H. B. Martin will take charge of, and prosecute to the best of his skill and ability certain actions now pending as follows, to-wit:

A certain action in which the said Thomas Gilcrease is plaintiff and George C. Butte *et al.* are

defendants now pending in the District Court of Muskogee County, State of Oklahoma, and a certain other action in which the said Thomas Gilcrease is plaintiff and one William H. Millikin is defendant, now pending in the District Court of Tulsa County, State of Oklahoma. That in the said case of *Gilcrease* v. *Butte,* that the compensation of the said H. B. Martin shall be 10 per cent of whatever sum is recovered and collected in said cause whether by judgment or compromise, and that the said H. B. Martin shall pay out of said commission his personal expenses in attending to said cause and that the compensation of the said H. B. Martin for his services in the case of *Gilcrease* v. *Millikin* shall be 7 and ½ per cent of all sums of money collected from the said William H. Millikin and the other defendants in said cause, on account of the royalties for which said suit is prosecuted. And 7½ per cent of all damages which may be recovered and collected in said cause.

It is further contracted and agreed that the said H. B. Martin shall represent the said Thomas Gilcrease in whatever litigation he may be a party for a period of one (1) year from the date of this contract, and that the compensation to be paid for such services shall be the reasonable value of the same to be agreed upon between the parties hereto at the time.

It is further agreed that a retainer fee of $200.00, the receipt whereof is hereby acknowl-

edged, shall be and is paid by the said party of the first part to the party of the second part, and that such retainer fee covers all services to be rendered, consultation, advice, examination of abstracts, and other services of a legal nature which may be required by the said party of the first part of the said party of the second part during the term of this contract, except the prosecution and defense of suits in court.

Provided, however, that the said H. B. Martin is to charge no commission upon such royalties as are admitted and paid without contest by the said William H. Millikin and ——— Colley, accruing upon said oil and gas lease from this date.

In Witness Whereof, we have hereunto set our hands this 21st day of April, 1910.

THOMAS GILCREASE,
Party of the First Part.

H. B. MARTIN,
Party of the Second Part.

EXHIBIT "D."

CONTRACT.

This Indenture, Made and entered into this 8th day of February, 1911, by and between Thomas Gilcrease, G. R. McCullough and H. B. Martin,

Witnesseth: That for and in consideration of

the mutual covenants and agreements hereinafter contained, the parties hereto contract and agree that the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their respective heirs, administrators and assigns shall have and hold in the proportions hereinafter described, the exclusive right to mine oil and gas from and upon the premises hereinafter described, to-wit:

The south one-half (½) of the northwest quarter (¼) and the north one-half (½) of the southwest quarter (¼) of Section Twenty-two (22), Township Seventeen (17) north, Range Twelve (12) east of the Indian Meridian in the County of Tulsa, and State of Oklahoma, as long as oil and gas, or either of them, are found upon said premises in paying quantities.

The said Thomas Gilcrease shall receive as royalty for said leased premises one-eighth (1/8) of all the oil mined and saved upon said premises, delivered in pipe line, and such royalty shall be paid at any time after the sale of such oil, upon demand of the said Thomas Gilcrease. And in addition to said royalty, the said Thomas Gilcrease, his heirs, administrators and assigns, shall have and hold an undivided one-fourth (¼) of the leasehold interest in said property. The said G. R. McCullough, his heirs, administrators and assigns, shall have and hold an undivided one-half (½) of the leasehold interest in said land; and the said

H. B. Martin, his heirs, administrators and assigns, shall have and hold an undivided one-fourth (¼) of the leasehold interest in said land.

And it is further contracted, covenanted and agreed that the parties hereto, their heirs, administrators and assigns, shall operate said lease for oil mining purposes from this date as long as oil and gas is found thereon in paying quantities, and that after the payment of the royalty hereinbefore provided for to the said Thomas Gilcrease, that all of the balance of the proceeds of the oil produced from said leased premises, less necessary operating expenses shall be applied to the payment of the cost of equipment of said lease until such equipment shall have been fully paid for out of said proceeds.

And it is further contracted, covenanted and agreed that the equipment now upon said leased premises, and hereafter to be placed upon said leased premises, shall be and remain the personal property of the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their heirs, executors and assigns, in the proportion of the interests of said parties in said leasehold, as evidenced by this contract.

And it is further covenanted, contracted and agreed that the said parties shall not remove any of said equipment, including powers, engines, tanks, lead pipes, houses, tubing, rods, casings or any other portion of said equipment from any wells

upon said leased premises, as long as oil is produced from said wells in paying quantities, but that when such wells shall become exhausted, and no longer produce oil in paying quantities, then such equipment may be removed by said parties hereto, their heirs, administrators and assigns.

And it is further covenanted and contracted that the expenses of operation of said leased premises for mining purposes shall be paid by the parties hereto in the proportion of their respective interests as hereinbefore described, except that the royalty interest of the said Thomas Gilcrease shall not be liable for any of the expense of the equipment or operation of said lease, and shall be free from any expenses whatever.

In Witness Whereof, we have hereunto set our hands this 8th day of February, 1911.

THOMAS GILCREASE,
G. R. MCCULLOUGH,
H. B. MARTIN.

State of Oklahoma, County of Tulsa, ss.

Before me, Benjamin C. Connor, a Notary Public in and for said County and State, on this 8th day of February, 1911, personally appeared Thomas Gilcrease, G. R. McCullough and H. B. Martin, to me known to be the identical persons who executed the foregoing instrument, and acknowledged to me each for himself that they exe-

cuted the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written. Benjamin C. Connor. My commission expires March 29, 1911.

EXHIBIT "E."

Know All Men by These Presents: That for and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the undersigned H. B. Martin has bargained, sold, released and assigned and does by these presents bargain, sell, release and assign unto Thomas Gilcrease of Tulsa, Oklahoma, his heirs, administrators and assigns, an undivided three-fourths (3/4) of all the rights, title and interest derived, had and held by the said H. B. Martin in and to the oil and gas mining right upon the following described real property, to-wit:

The south one-half (S½) of the northwest quarter (NW¼) and the north one-half (N½) of the southwest quarter (SW¼) of Section Twenty-two (22), Township Seventeen (17) north, Range Twelve (12) east of the Indian Meridian, in the County of Tulsa, and State of Oklahoma, under and by virtue of a certain contract of mining lease executed between the said Thomas Gilcrease, G. R. McCullough and the said H. B. Martin on the 8th

day of February, 1911, it being the intent of this assignment to convey to the said Thomas Gilcrease all rights, title, interest and privilege of the said H. B. Martin in the aforesaid contract of lease so far as the same affects the said undivided three-fourths interest of the said H. B. Martin.

It is further covenanted and contracted that the assignee, Thomas Gilcrease, assumes all obligations of the said H. B. Martin as to the said three-fourths interest, as to the expense of operating and equipping said leased premises.

In Witness Whereof, I have hereunto set my hand this 11th day of December, 1911.

(Signed) H. B. MARTIN.

State of Oklahoma, Tulsa County, ss.

Before me, Guy L. Reed, a Notary Public within and for said County and State, on this 11th day of December, 1911, personally appeared H. B. Martin, to me known to be the identical person who executed the above and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth. Guy L. Reed, Notary Public. My commission expires Aug. 21, 1912.

EXHIBIT "F."

ASSIGNMENT OF LEASE CONTRACT.

Know All Men by These Presents: That I, H.

B. Martin, of the city of Tulsa, Oklahoma, for and in consideration of the sum of One ($1.00) Dollar, to me in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, assigned, transferred and set over unto G. R. McCullough of Tulsa, Oklahoma, his heirs, executors, administrators and assigns one-fourth (¼) of that part of the leasehold interest of the said H. B. Martin upon the following described real property, to-wit:

The south one-half (½) of the northwest quarter (¼) and the north one-half (½) of the southwest quarter (¼) of Section Twenty-two (22), Township Seventeen (17) north, Range Twelve (12) east of the Indian Meridian, in the County of Tulsa, State of Oklahoma, evidenced by a certain written identure made and entered into on the 8th day of February, 1911, by and between the said H. B. Martin, one G. R. McCullough and one Thomas Gilcrease; which said indenture appears of record in the office of the Register of Deeds of the County of Tulsa, State of Oklahoma, at page 538 in Record number 99 of said office.

To have and to hold unto him, the said G. R. McCullough, his heirs, administrators and assigns, according to the terms and subject to the obligations of the said written indenture of February 8th, 1911, aforesaid.

In witness whereof, I have hereunto set my hand this 2rd day of March, 1911.

H. B. Martin.

State of Oklahoma, County of Tulsa, ss.

Before me, Roscoe Adams, a Notary Public in and for said County and State, on this 23rd day of March, 1911, personally appeared H. B. Martin, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In witness whereof, I have heunto set my hand and affixed my Notarial Seal the day and year first above written. Roscoe Adams, Notary Public. My commission expires June 6 ,1914.

To this petition the defendants all filed answer in which they admitted that the petitioner was a citizen by blood of the Creek Nation, and in which they admitted:

> And that he received the land described in his petition, as his allotment and admitted that the defendant McCullough was president of the First National Bank of Tulsa, Oklahoma, and that Bradshaw was the cashier of said bank, and that both had been stockholders of the Bank of Oklahoma, and that the defendant Martin had acted as their attorney at various times and cases for the period of four years previous, and that the First National Bank had taken over the business of the Oklahoma State Bank. They admitted that in August, 1909, W. H. Millikin had about forty-

two (42) producing oil wells on petitioner's land and that the defendant Martin was the attorney for the petitioner during the period of transactions set forth in petitioner's petition, and that he was Gilcrease's attorney in litigation against Millikin, concerning Millikin's wells on Gilcrease's allotment.

Defendants further admitted that on the 24th day of August, 1909, Gilcrease gave to defendant McCullough, an oil and gas lease on his allotment and that on the 22d day of October, 1910, McCullough transferred the one-fourth (¼) interest in the lease back to Gilcrease and a one-fourth (¼) interest to defendant Martin. Defendants also admitted that Gilcrease, on the 8th day of February, 1911, entered into the contract with the defendants, a copy of which is attached to the petition and marked "Exhibit D."

Defendants filed separate answers, their answers being found in the record, at pages following:

Answer of defendant H. B. Martin at page 28.

Answer of defendant G. R. McCullough at page 40.

Answer of defendant A. E. Bradshaw at page 49.

Answer of defendant Al Brown at page 56.

Defendants in their answers alleged that the petitioner had acted with them and received his part of the oil, as he was of age, as shown by the

rolls, and thereby ratified the leases and contracts entered into by him.

The petitioner filed replies to the answers of the defendants which are shown at pages 59 to 81 of the record.

The case was tried before the District Court of Tulsa County, and the petitioner introduced in evidence, a certified copy of that portion of the rolls of the Creek Nation applying to him, and a certified copy of enrollment record, which records are shown at pages 107 and 108 of the record. The plaintiffs did not object to those records for the reason that the date shown was not the date of the enrollment or not the date of the ages shown by the enrollment records, nor for the reason that the records offered did not constitute the entire record, but the record shows objections as follows:

> Mr. West: Plaintiff now offers in evidence certified copy of the enrollment record on file in the office of the Commissioner to the Five Civilized Tribes, pertaining to the enrollment of the plaintiff, Thomas Gilcrease, and certified by J. G. Wright, Commissioner to the Five Civilized Tribes.
>
> Judge Diggs: To which we object as being incompetent, irrelevant and immaterial and not shown that the certificate is made by the officer having custody and control of the original records.
>
> Mr. Cruce: Let me add one objection: That the plaintiff having proven by the plaintiff

himself that he was twenty-one years of age on the 8th day of February, 1911, and not claiming that they were surprised at that testimony they cannot now contradict their own witness by record testimony.

MR. BIDDISON: We are not asking to do that by this, if the court please, we are asking to prove the limitation fixed by the Act of Congress when he became capacitated to handle his land and the proof of his actual age goes to his capacity and competency, not legal competency but his actual capacity, business capacity, to transact business, which is a competent matter for the court to consider in connection with the other facts and circumstances of the case to show the youth, experience, and so forth, but as to the legal disability the roll that is under Congressional Act as fixing the time before which he could not dispose of his property, we introduce this evidence not for the purpose of showing the actual age, Congress cannot change a man's age as a fact as our Supreme Court has said and as the Federal Court has said, the Congress could not by Act make a man twenty-one years of age who was not 21 years of age, but they can prescribe a limitation and did so in that act fixing the time at which he could handle his allotment. They could do that and did do it.

(Record, pp. 107-108).

The District Court found that the petitioner was a minor at the time of executing the lease, but held that whether the lease was void or voidable, that he expressly adopted same, after he had reached his majority, and the court rendered a judgment in

favor of the defendants. See page 112 of the record.

The petitioner filed his petition in error in the Supreme Court of the State of Oklahoma, and that court affirmed the judgment of the lower court; see opinion, pages 110 to 124, inclusive.

The Supreme Court of Oklahoma held that the enrollment record

> "Is only conclusive that on that date (June 9, 1899) he (petitioner) had passed his 9th birthday and had not reached his 10th, and does not prove that he was a minor on February 8, 1911, the date of lease, sought to be set aside on the grounds of minority, which was four months and one day less than twelve years thereafter." (See Paragraph 5, Syllabus.)

The court held the lease of August 24, 1909, absolutely void as in violation of the statute above referred to, but held the contract of February 8, 1911, sufficient, not as ratification, but as a lease, though it contained no operative words as such, and that it did not violate restrictions of said act.

ASSIGNMENT OF ERRORS

1st. The Supreme Court of Oklahoma erred in refusing to be concluded by that evidence which the Act of Congress makes conclusive, the decision of said court being to the effect that actual age and not age as shown by the enrollment records is material inquiry in determining when restrictions are removed from a minor allottee's land.

2d. The Supreme Court of Oklahoma erred in holding in substance that the Act of Congress made actual age a material inquiry in determining questions arising under the act, so that the enrollment records are conclusive only as to YEARS of age and not conclusive as to the question arising under the act: "When could petitioner lease his allotment?"

3d. The Court erred in holding that the enrollment record was conclusive only in showing that petitioner passed his 9th birthday at the time of his enrollment, and not conclusive that he was of the exact age shown thereby.

4th. The Court erred in not holding that the term "conclusive evidence" as used in the Act of Congress means that class of evidence which, when produced, precludes judicial inquiry into actual age and makes immaterial any question, save: what age do the enrollment records show the allottee to be?

5th. The Court erred in holding that the contract of February 8, 1911, was a sufficient oil and gas lease, and was not void for having been given before the enrollment records showed petitioner to have reached the age of 21 years.

6th. The Court erred in holding the enrollment record, dated June 9, 1899, showed petitioner to be nine years old at that time, but was insufficient to show conclusively that he was a minor for all purposes arising under the act on February 8, 1911.

BRIEF OF AUTHORITIES AND ARGUMENT

The first, second, third and sixth assignments can be discussed together.

The Act of March 1, 1901, 31 Statutes at Large, 861, ratified by the Creek Nation on May 25, 1901, and commonly known as the Original Agreement, is the first law passed by Congress providing for the allotment of Creek lands. Section 4 of the said Act is as follows:

> "The allotment of any minor may be selected by his father, mother or guardian in the order named, and shall not be sold during minority."

The Act of June 30, 1902, 32 Statutes at Large, commonly known as the Supplemental Agreement, ratified by the Creek Nation on June 26, 1902, became effective on August 8, 1902, and is the next Act of Congress affecting this title. It amended Section 37 of the Original Agreement so as to make it read as follows:

> "Creek citizens may rent their allotment for strictly non-mineral purposes for a term not to exceed one year for grazing purposes only, and for a period not to exceed 5 years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes, and for a period longer than 5 years for agricultural purposes, and

leases for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character, violative of this paragraph, shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

The Act of April 21, 1904, 33 Statutes at Large 189, appropriating funds for the Indian Department, and fulfilling treaty obligations, provides as follows:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors and except as to homesteads, may, with the approval of the Secretary of Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe."

The next Act is that of April 26, 1906, Section 20 of which is as follows:

"That the allotments of minors and incompetents may be rented or leased under order of the proper court."

The next Act affecting this title is the Act of May 27, 1908, which contains the following provisions:

"*Section 1.* That from and after sixty days from the date of this Act the status of the lands allotted hertofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:

All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen and as mixed blood Indians having less than half Indian blood including minors shall be free from all restrictions."

"*Section 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal; Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of Interior, and not otherwise, and provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males. * * *"

Section 3 provides:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclu-

sive evidence as to the quantum of Indian blood of any enrolled citizen or freedmen of said tribes and of no other persons, to determine questions arising under this Act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedmen."

Section 5 provides:

"That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void."

Section 6 provides:

"That the persons and property of minor allottees of the Five Civilized Tribes, shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma * * * Provided, that no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise."

The effect of these Acts upon the alienation and power to encumber the lands by a minor Creek has been freqnently passed on by the courts, cul-

minating in the decision of the United States Supreme Court in the case of *Truskett et al.* v. *Closser,* 236 U. S. 223, decided February 3, 1915.

This was a case in which Goodman, a Cherokee of one-eighth Indian blood, made a lease on his lands of September 14, 1910, when he did not attain full age of 21 years until September 25, 1910, he having had the rights of majority conferred upon him by the District Court of Washington County on October 12, 1909. It will be noted that this minor was but 11 days short of being 21 years of age at the time of the execution of that lease, and between the execution of that lease, and the execution of the lease by the guardian which was confirmed by the proper probate court, his guardian executed a lease upon the same property to a different lessee and the question presented to the Supreme Court of the United States was whether the lease granted by the minor was absolutely void, and the Court held that the lease, just as a lease as was granted in this case, was absolutely void, and that the lease granted by the guardian and approved by the Court took precedence, and cited in support of its position the decisions of the Oklahoma Supreme Court in *Tirey* v. *Darneal,* 37 Okla. 606, 133 Pac. 614; *Tirey* v. *Darneal,* 37 Okla. 611, 132 Pac. 1087; *Jefferson* v. *Winkler,* 26 Okla. 653, 110 Pac. 755.

Also *Preddy* v. *Thompson,* 204 Fed. 955.

These cases would seem to settle the effect of

such a lease, and establish the proposition that the lease is void, but the contention is that it was void only in the sense of being voidable, and that the same was subject to ratification, and this is the issue to be met, and was the exact proposition decided by the trial court.

The principal case of *Truskett* v. *Closser* would seem to be conclusive against that proposition as well as of the invalidity of the lease in its inception, for it holds that the lease was so void that it could be ignored, by the guardian in granting a new lease, which would supplant it, and if it were merely voidable and its weakness consisted in the minority of the minor, it would be valid until the disaffirmance by him upon arriving at his majority, for as held in *Oliver* v. *Handlet,* 13 Mass. 237, a guardian cannot avoid his ward's contracts that are voidable only by reason of his minority. The same rule is laid down by Woerner on Guardianship, page 173. And that this is the rule in the United States Supreme Court is settled by *Sims* v. *Everhardt,* 102 U. S. 300 L. Ed. 87, where the court says:

> "It is settled that an infant cannot disaffirm a deed while his infancy continues."

If, then, the court, recognizing the rule that as to the disability of minority only, the deed or lease of a minor is only voidable and cannot be disaffirmed during minority, reaches the conclusion

that the lease such as was given in this case can be avoided during minority when that minority terminates in a very few days, it must be taken that they hold the lease so utterly void as not to be susceptible of ratification, and needs no disaffirmance.

This dostrine is the doctrine of the Oklahoma Supreme Court in decisions it has rendered, and it has uniformly held that conveyances of Indians before the removal of their restrictions were void, although the invalidity of conveyances was declared by Statute in the same language that we find governing the case at bar, as for instance, the case of *Rogers* v. *Noel,* 34 Okla. 238, 124 Pac. 976, where the Oklahoma Supreme Court held a conveyance by a Choctaw Indian, after the removal of restrictions, but before such removal was effective, was void and not merely voidable.

Conveyances by an Indian before he is shown to be of full age by the enrollment records are held to be void in the following cases:

Bell v. *Cook,* 192 Fed. 597.

Bruner v. *Cobb,* 131 Pac. 165, 37 Okla. 228.

Tirey v. *Darneal,* 133 Pac. 614, 37 Okla. 606.

Coody v. *Coody,* 136 Pac. 754, 39 Okla. 719.

Phillips v. *Byrd,* 143 Pac. 684, 43 Okla. 556.

Reed v. *Taylor,* 144 Pac. 589, 43 Okla. 816.

Cornelius v. *Yarbrough,* 144 Pac. 1030, 40 Okla 375.

Collins Inv. Co. v. *Beard,* 148 Pac. 846, 46 Okla 310.

Henley v. *Davis,* 156 Pac. 337, — Okla. —.

Bell v. *Mills,* 148 Pac. 1173, — Okla —.

Carter v. *Prairie O. & G. Co.,* 160 Pac. 319, — Okla. —.

Egan v. *Ingram,* 161 Pac. 225, — Okla. —.

Catron v. *Allen,* 161 Pac. 829, — Okla. —.

Allison v. *Crummey,* 166 Pac. 691, — Okla. —.

Nardridge v. *Smith,* 6 Okla. App. Court Rep. 378 (decided May 21, 1918, not yet officially reported).

Southern Surety Co. v. ————, 6 Okla. App. Court Rep. 451 (decided May 28, 1918, not yet officially reported).

Campbell v. *Daniels,* 6 Okla. App. Court Rep. 554 (decided June 26, 1918).

Etchen v. *Cheney,* 235 Fed. 104.

Barbre v. *Hood,* 214 Fed. 473.

When did the petitioner arrive at the age when he could lease his land?

The enrollment records of the Creek Nation show that the petitioner was nine years of age when he was enrolled June 9, 1911.

Section 3, the Act of Congress of May 27, 1908, is as follows:

That the rolls of citizenship and freedmen

> of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and no other persons to determine questions arising under this Act and the enrollment records of the commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

The Supreme Court of Oklahoma held that this was evidence that petitioner was 21 years of age on June 9, 1911, but holds that it does not show that he was not of age at some time previous to that date, and that the enrollment records are not conclusive that he had not arrived at the age of 21 previous to the above date, but that he might have arrived at the age of 21 during the 12 months previous to that time.

We think it clear that Congress must have had some purpose when enacting the above quoted legislation and that purpose was to fix a definite date on which mixed blood citizens of the Five Civilized Tribes would have the right to alienate their allotments. Congress could not have intended by legislation to say when an Indian arrived at the age of 21 years, but Congress could say, and we think intended to say, at what time the Indians could sell their lands.

Congress also intended to do away with the uncertainty among the Indians as to when they actually

became of age, and to render certain and definite the rights of the Indians and the people dealing with them, and remove the temptation of litigation and perjury in contests as to when an Indian arrived at the age of majority.

The first construction of this section by any court, was the United States Circuit Court, for the Eastern District of Oklahoma, in the case of *Bell* v. *Cook,* 192 Fed. 597. The court in this case says:

> "By section 3 of the act of May 27th, above quoted, it is seen that Congress declared the public rolls of citizenship and of freedmen members of the Five Civilized Tribes conclusive evidence of the quantum of Indian blood possessed by an enrolled citizen or freedman, and by the enrollment records of the commission of the age of any enrolled citizen or freedman to be conclusive of the age of such person in the determination of the right of such person to alienate their allotments. The object, purpose and intent of Congress by this portion of the act was not by its *ipse dixit* to make that which was black white, or the reverse, nor was it enacted for the purpose of putting questions of fact beyond the pale of judicial inquiry. This, of course, it could not do and would not assume to attempt. On the contrary, however, said portion of the act, and the public rolls prepared under authority of Congress as well, were all part and parcel of a general scheme worked out and employed by the government in the allotment of tribal property in severalty to the members of the tribes and in an endeavor to protect such allottees in their several property rights by such means

and to such extent as the exigencies of the case, the ignorance and environment of the allottee considered, was demanded for the best interests of the wards of the government. In carrying out this scheme of protection Congress, as it had the undoubted right to do, defined the word 'minor' as it did therein and referred any and all persons intending to become purchasers of any portion of the tribal property from an allottee thereof, not to the uncertain hazard of a judicial inquiry based on the evidence of ignorant, incompetent and interested witnesses, but to the fixed and definite public rolls to ascertain whether such allottee did or did not possess the qualified age or requisite degree of Indian blood to confer on him the power of disposition under the law. If an intending purchaser from an allottee of tribal property holding the public rolls in one hand, and the act in the other, by a comparison of the two found such allottee possessed of the power of disposition under the act and the rolls, he was at liberty to purchase and he was protected in such purchase. If, on the contrary, the law and the public rolls considered together denied the right of the allottee to convey, a purchaser from such allottee was not protected, and this regardless of the true state of facts as they might be made to appear in this case."

The Supreme Court of Oklahoma, in the case of *Yarbrough* v. *Spalding,* 123 Pac. 843, 40 Okla. 447, in construing section 3, the Action of May 27, 1908, say:

"And having under consideration this iden-

tical act of Congress, this court, speaking through Mr. Justice Hayes, in the case of *Jefferson* v. *Winkler,* 26 Okla. 653, 110 Pac. 755, said: 'It is unnecessary to comment upon the extent or limitation of the authority over the lands and property of such Indians that is by said provision of the enabling act reserved to the United States government; for, whatever be the extent of that authority or its limitations, we think it cannot be questioned that said authority reserved is sufficient to retain in the government of the United States jurisdiction over the restricted lands of said Indians to determine and provide how and in what manner such restrictions shall be removed; and that, until such restrictions are removed, the lands of said Indian minor allottees are not within the jurisdiction of the probate courts of the state, with power in said courts to order the sale thereof for any purpose. Since the power to remove such restrictions is wholly within Congress, it may say upon what terms and conditions they will be removed, and under the supervision of what court or officer the sale of same shall be made.' Among the terms and conditions fixed by this act are found the provisions that the jurisdiction of the probate courts of the state of Oklahoma over the lands of minors and incompetents is made subject to the foregoing provisions, to-wit, the status of the lands, and thereunder was defined the term 'minor' or 'minors,' to the end that the state might not pass an act making either a less or a greater number of years conclude the minority of the parties with whom it was then dealing, or otherwise effect a change in their rights of

alienation. It was also provided that the rolls made by the Dawes Commission, approved by the Secretary of the Interior, should be conclusive evidence as to the quantity of Indian blood of any enrolled citizen or freedman; and that they should hereafter be conclusive evidence as to the age of the said parties in determining matters arising under the act. The power to thus legislate for these citizens of the state of Oklahoma was reserved to Congress by section 1 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), and recognized and sanctioned in section 3 of article 1 of the Constitution; and the state courts are bound, in good faith, to enforce these congressional regulations in reference to the lands of members of these tribes. The record introduced was one made under congressional authority by a commission organized for the purpose of perfecting these rolls. A census was authorized, if not directly enjoined, and the information, thus gathered at great expense, was in possession of Congress. All agree upon the purpose and end to be secured by restricting these allottees in their right to alienate their lands.

Counsel charge and admit on both sides that on a trial, wherein the question of the ages of these allottees arises, virtually no dependence whatsoever is to be placed in the accuracy of the testimony or evidence adduced. It is asserted and admitted to be a matter of general knowledge that these people generally kept but few, if any, records showing their family history or ages; and that as a consequence any proof adduced at any time in any controversy is subject to all the fluctuations incident to

ignorance or self-interest. This being true, Congress cannot be presumed to have been ignorant of these facts; and these ages, thus fixed by an impartial judicial commission, without interest to do aught else than, with such light as it could obtain, fix them correctly, were in the main more likely to be accurate than ages established at a time and under conditions where self-interest or ignorance would produce either deception or error. The stability of land titles is of paramount importance everywhere; and this wise and salutory statute of Congress will have much to do with permanently determining the same to a large quantity of this tribal land. Congress has not sought herein to make that which was false true, or to make that which was true false; the ages fixed were not for the purpose of establishing any rights whatsoever under the laws of the state; they were not conclusive of the age of consent, of marriage, or of the right to exercise the elective franchise; they refer solely to the determination of questions arising under the act. The fact that some of these ages are manifestly inaccurately stated in the records in nowise changes or alters the rule laid down. The power of Congress to say upon what terms restrictions should be relaxed or removed was absolute; and the act in this respect is, in our judgment, constitutional and valid."

The Supreme Court of Oklahoma, in the case of *Phillips* v. *Byrd,* 143 Pac. 684, 43 Okla. 556, in discussing this statute, say:

"It is clear to us that all Congress intended

to do by the enactment of that part of the statute under consideration was to prescribe a condition upon which this class of enrolled citizens and freedmen of the Five Civilized Tribes might alienate their lands. Congress, having reserved the exclusive right to legislate concerning the property of the Indian Tribes and their members, could have said, as a condition precedent to alienation, that an Indian should be considered a minor until he reaches the age of 25 years; and in such cases, the enrollment records of the Commission to the Five Civilized Tribes should be conclusive as to what date he would reach this age. Likewise, Congress could have provided that for the purpose of alienation, the members of the Tribes should be considered at full age at 15 years, and that the enrollment records should be conclusive as to when an enrolled citizen or freedman reached his majority, or the age which would authorize him to deal concerning his land."

The enrollment records are held to be the evidence of the Indian's age in the following cases:

Bruner v. *Cobb*, 131 Pac. 165, 37 Okla. 228.

Tirey v. *Darneal*, 133 Pac. 614, 37 Okla. 606.

Coody v. *Coody*, 136 Pac. 754, 39 Okla. 719.

Reed v. *Taylor*, 144 Pac. 589, 43 Okla. 816.

Cornelius v. *Yarbrough*, 144 Pac. 1030, — Okla. —.

Collins Inv. Co. v. *Beard*, 148 Pac. 846, — Okla. —.

Barbre v. *Hood*, 214 Fed. 473.

DATE ON CENSUS CARD

There was introduced in evidence in this case the enrollment record consisting of a census card showing Thomas Gilcrease's age to be nine years and the Oklahoma court says that there is nothing to show when the application for enrollment was made as if the date of the application for the enrollment governed and further says that the date of this card has no probative force or effect. The syllabus of the case says that there was nothing on the face of the card to show that the date thereof, June 9, '99, was the date of application for enrollment, and the card was without probative force to prove that plaintiff was nine years of age on that date.

"Probative" in the law of evidence, means having the effect of proof, tending to prove, or actually proving, 32 Cyc. 405. Let us see, then, if there is in the dating of this card any probative force as to the date at which Thomas Gilcrease was determined to be nine years of age.

In *McDaniel et al.* v. *Holland,* 230 Fed. 945, cited by the court in its opinion, the court says that such a card as we have here, a general census card, represents a finding and judgment of the commission on the application as to the facts therein stated. This date, June 9, '99, appears in the lower right hand corner of the card and is a date, and apparently the date of the record, for it bears no other date and would therefore appear to be with-

out contradiction or explanation the date of the determination that Thomas Gilcrease was nine years of age.

It is common knowledge and common practice, so much so that courts take judicial knowledge of it and presume that the date in the margin of instruments are the dates of their execution. A date in the margin of a receipt, a bill, a note or a deed has been frequently held to be *prima facie* the date of its execution and here we have an instrument or record dated, and without contradiction or explanation. We have the rule refused, and refused, too, in spite of the fact that the court unconsciously, as did the Circuit Court of Appeals in *McDaniel* v. *Holland, supra,* give it probative force.

In *McDaniel* v. *Holland* the court gave it absolutely probative force to the extent that it went, of showing the time from which the age should be computed. It did it unconsciously and automatically.

That has probative force which the normal mind of man takes as some evidence and considers as of some weight for the determination of a fact in issue. The Oklahoma court did not find it necessary to say that other words appearing on the face of the certificate or card did not have probative force merely because they did not indicate anything as to the determination that Thomas Gilcrease was nine years of age, but unintentionally, automati-

cally and unconsciously the court did turn to this date as the probable date of such determination and of such instrument, and to that extent it did have to the Oklahoma court probative force, as it must have to every normal mind. It is to be noted that it is not a question of weight to be given to this evidence against contradiction or explanation, but it is a question, as the court stated it plainly, of probative force, and unconsciously the mind turns to this date as a date of the record, as it does to the date on a letter, to a date on any written instrument as a receipt, check or note. Notwithstanding the denial of the court of the probative force of this date it did have probative force to the mind of the court it would not have considered it, and in the absence of contravening evidence or contradiction caused the mind to turn to it as the date of an enrollment and of the record it is sufficient to establish that fact.

But further, the courts take judicial knowledge of the ordinary practices of the departments of government and that Congress in passing the law in question had knowledge of such practices, and when it adopted a record as evidence of a fact, it knew what that record contained and that the courts would know the practice and recognize such records as the courts recognize the signature of the officers that certify them, and it is common knowledge and the court would take judicial knowledge, and that it is common knowledge that the

date of these records is placed upon them in the manner in which this date is placed upon this card.

To be sure in the case of *McDaniel* v. *Holland, supra,* there was a specific proof that certain words, "Date of application for enrollment," had been inserted after the making of the record, and in addition to the apparent date on the card, which latter the court took as the determinative date and said that the card did show on that date he had passed his ninth birthday and had not yet reached his tenth.

The census card appears between pages 108 and 109 of the record, in the lower right-hand corner has the figures, "June 9, '99." That is the date of the enrollment and it is the universal custom of the Department of the Interior to so indicate it and is exactly like every census card that we have ever seen. And we submit that that is ample evidence before the court as to the time of the enrollment and unless that date is admitted to be the date of the enrollment in many instances the enrollment record could not possibly show the age of the Indian and another element would be injected into the Indian question and bring premature gray hairs to lawyers and judges of our courts.

CONCLUSIVE EVIDENCE

The court erred in not holding the term "conclusive evidence" as used in the Act of Congress, to mean that class of evidence which, when produced, precludes judicial inquiry into actual age and makes immaterial any question save: what age does the enrollment records show the allottee to be?

The court overlooked the inherent nature of CONCLUSIVE EVIDENCE and of laws, making one fact conclusive evidence of another.

One of the principal controversies in this case is as to the age of Thomas Gilcrease on the 8th day of February, 1911, at the time he entered into a working contract covering the operation of his premises, this being the contract which the court in its opinion finds valid and from which it determines the rights of the parties, having properly found a previous contract dated August 24, 1909, to be absolutely void. The Act of Congress of May 27, 1908, chap. 199, sec. 3, provides that the enrollment records of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the age of an enrolled citizen or freedman. The court in its decision and opinion does not give that record conclusive effect and does not give the words "Conclusive Evidence" the legal effect to which they are entitled.

Conclusive evidence is defined by Bouvier as follows:

> "Evidence which of itself, whether contradicated or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue."
>
> "Evidence upon the production of which the judge is bound by law to regard some fact as proved and to exclude evidence to contradict it."

It is defined by *3rd Encyclopedia of Evidence,* page 268, as follows:

> "Conclusive Evidence is that character of evidence which either forbids or dispenses with an ulterior inquiry as to the matter sought to be established by proof."

In *Missouri, Kansas & Texas Railway Company* v. *Simonson,* 64 Kans. 802, 68 Pac. 653, 91 Amer. St. Rep. 248, the Supreme Court of Kansas says at page 808 of the Kansas Report:

> "A statute which declares what should be taken as conclusive evidence of a fact is one which of course precludes investigation into the fact and itself determines the matter in advance of all judicial inquiry."

In *Thompson Lumber Company* v. *Interstate Commerce Commission,* 193 Fed. 682, the court says:

> "Conclusive evidence is that which is incon-

trovertible; that is to say, either not open or not able to be questioned."

From these authorities it is apparent that the effect of the Act of Congress is to withdraw the question of age from judicial consideration in determining the questions arising under that act and to make actual age immaterial and to fix for the purpose of the act the age shown by the enrollment records as the age by which minority or majority shall be shown. Most statutes which have undertaken to establish a rule of conclusive evidence have been declared unconstitutional by the courts as an invasion of the judicial function and as depriving persons of property without due process of law, and this decision has always been made upon the ground that such statutes prevent judicial inquiry into the actual evidence upon which the party rights depended, but many courts have upheld such statutes, but only in cases where the legislative department had the right to fix the substantive law and have held in all such cases that the establishing of such a rule of evidence was in effect the making of substantive law. See *Wigmore on Evidence*, vol. 2, sec. 1354, pars. 1-2, and in general upon the subject of Conclusive Evidence. See secs. 1353 and immediately preceding sections. To the same effect, see *3 Ency. of Evidence*, pages 291-293, inclusive.

In no case in which the judiciary did not have the power to fix the substantive rights of the par-

ties and enact the substantive law upon the subject, have the courts upheld acts of that character. In *Commission of Fisheries et al.* v. *Hampton Roads Oyster Packers & Planters Association,* 64 S. E. Rep. 1041, the Supreme Court of Virginia had before it an act making conclusive evidence certain surveys of the waters adjacent to the State of Virginia to determine their character as oyster beds, and that court upheld the act and said that its effect was to preclude any judicial inquiry into the actual fact as to whether any other waters contained oyster beds and as to whether certain oyster beds were in such waters, and that court cites with approval *Gardner* v. *Bonstell,* 180 U. S. 362, 45 L. Ed. 574, in which latter case the United States Supreme Court follows the rule which it has long recognized in many other decisions, that the declaration of the political department of the government as to the character of public lands, whether mineral, non-mineral, desert, forest or otherwise, is conclusive upon the courts and precluded any investigation into the actual evidence. So in that class of statutes, like our own, which make the issuance of a tax deed conclusive evidence that the proceedings culminating in such deed were legal, have been uniformly upheld so far as the recitals in the deed referred to non-jurisdictional matters or matters over which the legislature had control and could create the substantive law. See *Joslyn* v. *Rockwell, et al.,* 28 N. E. Rep. 604, also *Larson* v. *Dickey,*

39 Neb. 463, 42 Amer. State Rep. 595.

The foundation and basis of all these decisions, whether they uphold the constitutionality of the act in question or deny its constitutionality is that they prohibit judicial inquiry into the fact, and leave as the sole subject of investigation the fact of the issuance of the deed and its recitals. So in *Safe Deposit & Trust Co. of Baltimore* v. *Marburg,* 72 Atl. 839, the Court of Appeals of Maryland held valid the act which provided that the failure to demand ground rent for twenty consecutive years shall be conclusive that such rent has been extinguished, to be constitutional and valid because the legislature had the right to fix the substantive statute of limitations and accruing of right by adverse possession and made by this act an actual inquiry as to the extinguishment of the rent proper, leaving only the question as to whether or not rent had been demanded within the period of twenty years.

Giving now these decisions and these authorities their force the effect of the Act of Congress is to say that the age of a Creek citizen or freedman is not an issuable fact in any controversy arising under the Act of Congress; that it has been taken out of judicial inquiry and settled by legislative enactment and that the only question for consideration by the court is: "What age does the roll show the citizen or freedman to be?" for by the

express terms of the Act, the enrollment records are the conclusive evidence of the age; that is the evidence which excludes every other form of evidence and every presumption, and substitutes for it the *ipse dixit* of the enrollment record, and it is as if Congress had said in cases involving the age of a citizen or freedman and the validity of his conveyances under the restrictions of this Act, "He is conclusively presumed to be of the age which the roll shows him to be."

If the enrollment record shows the actual birthday, then that controls; if the enrollment record does not give the birthday, but gives the age in years, then there is no presumption that he was of age before the roll shows him of age, but he will be presumed to be actually of the age that the roll shows him to be.

As stated by the court in *Commission of Fisheries* v. *Hampton Roads Oyster Packing Association, supra,* the purpose of the enactment was to prevent the needless litigation and perjuries that resulted from the judicial inquiry into the actual facts and to fix a certainty upon which all parties might depend. It is well known that our courts were filled with perjury upon the actual ages of the Indians and freedmen; that it resulted in uncertainty as to titles and endless litigation. Congress could have had no other purpose in this enactment than to terminate such litigation and such perjury and give certainty to titles; and to hold that the

words, Conclusive Evidence, as used in the Act of Congress, do not mean exclusive evidence as the courts have always held it to mean, is to reopen the door to all this perjury, to all this litigation, and to put a foundation of sand under the freedman and Creek titles.

Congress has not enacted that the validity of conveyances should be determined by actual age, but that the validity of conveyances should be determined by certain conclusive rules; that is to say, by the age shown by the enrollment records, and to deny this conclusive and exclusive effect of the enrollment records is to deny the Act of Congress its force and to refuse to construe it in the light of the wrongs which it sought to remedy.

No opinion that has been handed down by any court upon this subject has ever construed what conclusive evidence means in the law, nor considered the effect of making the enrollment records conclusive evidence in the light of all the authorities discussing what conclusive evidence really is; that is, evidence which fixes a fact, eliminates judicial investigaton of the primary fact, and makes the rule laid down by the legislature the sole guide to its determination.

It is not an attempt to make the actual ages different from what they were, but it is an attempt to say what the word "age," as used in the act shall mean and how it shall be determined and how it

shall be conclusively determined; and unless every authority that has ever discussed conclusive evidence or acts making one fact conclusive evidence of another, has misconstrued these acts and repeatedly held them unconstitutional because the effect of them was to prohibit any further evidence or judicial inquiry into the primary fact, has been in error, the holding of the court in this case is unsound.

It is the age shown by the rolls that is the sole subject of judicial inquiry and it is the age shown by the rolls that determines the validity or invalidity of a conveyance. The Act of Congress does not attempt to fix the birthday not in consonance with the fact. It does not attempt to say that a party may not have been older or younger, or may not have reached majority at an earlier date than shown by the rolls, but it does say that the roll is conclusive, and thereby exclusive evidence upon the subject of the word "age" as used in the act, for all purposes arising under the act and therefore there is no presumption of majority unless the record shows minority; but the conclusive presumption is that he is of the exact age shown by the enrollment.

If, as stated by these authorities, conclusive evidence excludes all other evidence and determines the fact, then the enrollment record excludes all other evidence and determines the fact of age for

the purpose of the act and days and months have nothing to do with the investigation unless shown by the record.

The following extract from the Secretary to the Chairman of the Senate Committee on Indian Affairs, shows the purpose of the Act under consideration.

DEPARTMENT OF THE INTERIOR.

Washington, February 6, 1908.

Honorable Moses E. Clapp,
Chairman, Committee on Indian Affairs,
United States Senate.

Dear Sir:

As a matter of broad policy and for the good of the Indians as well as of the community in which they live, this Department believes that just as soon as any Indians, or classes of Indians, are found to be reasonably competent to manage their own business interests, they should be made free from all restrictions. In this way they are given the same opportunity as other citizens of the United States to enjoy their property and to fulfill their destinies as citizens. This policy was adopted without overlooking the fact that in a community of reasonably competent white citizens, many of them are constantly losing or squandering all or part of their property, and that reasonably competent Indians will in all likelihood, do the same. Their ability having once been established, it is better that they should take their chances with their white neighbors, learning as all other citizens must, —by experience.

Until such reasonable competency is reached, however, it is exceedingly important to fulfill the trust imposed upon the government by the circumstances and conditions surrounding the history of the relations between the Indians and the white people of this country.

The claim of the new State of Oklahoma that all land possible should be made subject to taxation in order that the State, counties, and townships may be able to support their public institutions, especially the schools which are needed for the Indian children as much or more than for the whites, has properly so much weight that the government, for the sake of the Indians, should at this time, keeping in mind the considerations set forth above, go as far as possible in the direction of removal of restrictions.

For that reason the allottees of the Five Civilized Tribes should be considered, in respect to their business competency, rather from the standpoint of classes than of individuals, and the Bill (S. 4644) proposes to free from restrictions all classes, the members of which, as a whole, can be reasonably considered as competent as the rural Whites in other states. Thus, all allottees having no Indian blood, and allottees of less than half Indian blood are freed from restrictions. Other mixed blood Indians are made free so far as surplus land is concerned, their homesteads being protected until individual competency can be shown to the Secretary of the Interior. It is recognized that full-bloods, as a class, are not competent to compete in business relations with the Whites. For that reason all their restrictions are maintained for a period of twenty-five

years unless in individual cases competency can be conclusively shown or the Secretary of the Interior finds it advisable to sell all or part of the land of particular non-competents in order to use the proceeds under supervision of their material welfare.

Section 2 provides for the leasing of the restricted land. It leaves all leases for five years or less, except oil, gas, or mineral leases, in the hands of the allottees themselves in order that they may learn to transact business. In the case of leases for longer terms, and of the oil, gas or other mineral leases, the Indians will be allowed to negotiate for the lease contracts, but the arrangement will not be final until approved by the Secretary of the Interior.

Section 3 is a provision to prevent much litigation concerning the quantum of blood and age of allottees. It makes the rolls of citizenship and of freedmen conclusive evidence. Without such a provision much fraud and perjury might result.

Section 4 makes sure that the land from which restrictions are removed shall be taxable at once in order that the allottees, considered in classes as competent, may take up their share of the civil burdens of the State and counties in which they live.

Section 5 makes deeds, encumbrances, or leases, taken contrary to the terms of the proposed act, absolutely null and void. This is expressed unequivocably to facilitate the clearance of titles in those cases where such deeds have been acquired prior to the removal of restrictions, either in the hope that the laws

providing for restrictions, may be declared unconstitutional, or in order to cloud the title in such a way that the holder of the invalid deed may profit either in the purchase of the land at a low price or by receiving a compensation for removing the cloud.

Very respectfully,

James Rudolph Garfield,
Secretary.

The Acting Secretary writes an identical letter under date of February 12, 1908, to the Chairman of the Committee on Indian Affairs of the House of Representatives.

The following letters show the contemporaneous construction:

Muskogee, Oklahoma,
August 14, 1908.

Subject: Age of citizens of Five Civilized Tribes as same appears on tribal roll.

The Honorable
The Secretary of the Interior.

Sir:

I have the honor to enclose herewith letters of R. D. Welbourne, of August 12, 1908, and C. D. Wolfe, of August 13, 1908, asking the construction this office places upon a question in connection with the ages of citizens of the Five Civilized Tribes. These are but two of the numerous inquiries I have received along the same line and as it is a matter of con-

siderable importance to persons investing in Indian lands, I consider it advisable that the Department pass on this question at the earliest practicable date.

The proposition is whether a citizen of the Cherokee Nation, for example, whose age appears on the final roll as fourteen years, said roll being approved as of September 1, 1902, would be considered as not having reached his majority until September 1, 1908, even though as a matter of fact it could be clearly established he was born April 15, 1887, and would be twenty-one April 15, 1908.

There is nothing in the records of this office to establish the exact age of any citizen except where birth affidavits have been required, and all of these cases, the persons in connection with whose enrollment such affidavits were required still lack several years of maturity. In the other cases testimony was taken and the question as to the age of persons for whom application was made was asked, but the answer given is in every case, so far as an examination of the record shows, given in years only and while the age is probably given to the nearest year, it may refer to the age of the applicant on his last birthday or his next subsequent birthday. Consequently, there is little in the records that would throw any light on this matter when the age as shown on the final rolls is in question.

In view of the numerous inquiries I have relative to this matter and its relative importance, I have the honor to request that this

matter be passed on at the earliest practicable date.

Respectfully,

(Signed) J. G. Wright,
Commissioner.

WSDM (LKP)
End. 15-1.

* * * * * * * *

Through the
Commissioner of Indian Affairs,
Washington, D. C.
3-2833

Land
56330-1908
E B H

August 24, 1908.

Subject: Computation of ages of citizens of Five Civilized Tribes.

The Honorable,
The Secretary of the Interior,

Sir:

I have the honor to invite your attention to the enclosed letter of August 14, 1908, from J. G. Wright, Commissioner to the Five Civilized Tribes, enclosing letters from R. D. Welbourne, Chickasha, Oklahoma, of August 12, 1908, and C. D. Wolfe, Wewoka, Oklahoma, of August 13, 1908, asking that a rule be laid down for a computation of the ages of citizens of the Five Civilized Tribes. He says that these are but two of numerous inquiries that he has received regarding the same subject and he believes that the Department should pass on the question at an early date.

He presents the proposition in this manner:

'Whether a citizen of the Cherokee Nation whose age appears on the final roll as fourteen years, the roll being approved as of September 1, 1902, should be considered as not having reached his majority until September 1, 1908, even though it could be clearly established that he was born on April 15, 1887, and would be twenty-one years of age on April 15, 1908.'

He reports that there is nothing in the records of his office to establish the exact age of any citizen, except where birth affidavits have been required, and in all these cases the persons in connection with whose enrollment such affidavits were required, still lack several years of their majority. In the other cases, testimony was taken regarding the age of persons for whom application was made but the answer given in every case, so far as an examination of the records shows, is given in years only and, while the age is probably that of the nearest year, Mr. Wright says he believes that it may refer to the age of the applicant on his last birthday, and he expresses the opinion that this character of records leaves the question of age in doubt.

It is very seldom that a person on being asked his own age, or the age of anyone else, gives any other than the age at the last birthday. The rule is so universal, in the opinion of the Office, as to justify a holding that in all cases where the age of a minor is given by parents or relatives, the age given relates to the last preceding birthday. The Act of Con-

gress approved May 27, 1908, (Public No. 140), provides (Section 3):

'* * * * the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

It was necessary that a rule be laid down with reference to the determining of ages of enrolled minors in the Five Civilized Tribes to prevent the production of fraudulent proof as to age by persons who purposed to take advantage of the lack of age and experience of allottees, and Congress decided that the records of the Commissioner to the Five Civilized Tribes should be the criterion of age because the presumption would be that at the time application was made for enrollment no circumstances existed that tended to induce misrepresentation regarding the ages of persons in behalf of whom proof was being submitted.

The Office recommends that the Department hold that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment shall be construed, for the purposes of the Government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise.

Very respectfully,

(Signed) F. E. Leupp,
Commissioner.

MOC.
August 27, 1908.
WCP.

Approved,
(Signed) Jesse E. Wilson,
Assistant Secretary.

December 21, 1910.

* * * * * * * *

Attorney General for the Interior Department,
Washington, D. C.

Dear Sir:

Section 3 of the Act of Congress approved May 27, 1908, (the restriction bill) provides, as follows:

'That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes, and of no other persons, to determine questions arising under this Act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

You will observe that the language of the Act is 'the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to age.'

If you will advise me, I would like to know what your office holds 'the enrollment records' to be. I understand that at the time minors were enrolled by their parents, guardians, curators and next friends, that the Commissioner to the Five Civilized Tribes required certain evidence; that a statement of the age

of the minor was required. But, later on it seems that in making the final roll the Commissioner to the Five Civilized Tribes has figured all ages from September 1, 1902. The question is, Does the sworn testimony given in by the party enrolling the minor allottee govern, or does the roll made up from the testimony govern, or in other words, do all birthdays of enrolled minors, by reason of this law, fall on September 1, for commercial purposes in dealing with their lands? Or, should one, in dealing with minors, go back of the roll and rely on the testimony upon which the roll is based?

As I understand it, if a parent had on August 1 of a certain year given in testimony and enrolled his child, that child, according to the roll book, would become of age on September 1, although he would be past his majority. While, on the other hand, if, in the same year, the parent had applied on October 1 and had enrolled said minor, the roll book would show him to be of age on the same September 1, when he might be under age.

This inquiry may be rather poorly expressed but you can determine from the foregoing what I desire to know, that is, what your office holds to be 'the enrollment records,' which the law makes conclusive evidence as to age.

Your answer will be much esteemed and will be an accommodation for which we will be greatly obliged to you.

Respectfully,

W. D. Humphrey,
By E. A. Titsworth.

WDH|EAT

Land
Population
101291-1910
J E D

February 15, 1911.

* * * * * * * *

Enrollment
records.

Mr. W. R. Humphrey,
Attorney at Law,
Nowata, Oklahoma.

Sir:

Referring to your communication of December 21, 1910, requesting information as to the Department rule for the computation of ages of the cancelled citizens of the Five Civilized Tribes of Oklahoma and as to what are considered 'the enrollment records,' you are advised that Section 3 of the Act of Congress approved May 27, 1908 (35 Stat. L., 312) provides that 'the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

It has been held by the Department that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment should be construed for the purpose of the Government as represents the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of birth, except where the records show otherwise.

The enrollment records consist of the tribal rolls, the testimony taken, and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant was based.

Respectfully,

(Signed) Frank Pierce,
First Assistant Secretary.

2-WJG-11.

* * * * * * * *

Land
Population
88795-1910
JED

March 3, 1911.

Age of
Hattie Feland,
210 St. Botolph Street,
Boston, Massachusetts.

Madam:

Referring to your communication of November 6, 1910, in which you claim that the enrollment records are in error as to your age, and in which you request that correction be made in order that you may be able to mortgage your property, you are advised that the name of Hattie Feland appears opposite No. 4523 on the final approved roll of citizens by blood of the Chickasaw Nation, and that said person is reported on the roll mentioned as being at that time nine years of age.

The ages appearing on the final approved roll of citizens by blood of the Chickasaw Na-

tion were computed as of September 25, 1902. In Section 3 of the Act of Congress approved May 27, 1908 (35 Stat. L. 312), it was provided that

'The enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

It has been held by the Department that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment should be construed for the purposes of the Government as representing the age of the applicant at that time and that the date of the application should be held to be the anniversary of the date of birth except where the records show otherwise.

The enrollment records consist of the tribal rolls, the testimony taken, and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant was based. There is no authority of law for the Secretary of the Interior to alter the notation upon the rolls as to the age of the persons whose names appear thereon.

Respectfully,
(Signed) C. F. Hauke,
Second Assistant Commissioner.

2-JWC-27

* * * * * * * *

Land-Allotments.
114698-1912.
GR
Age of Allottees.

December 23, 1912.

Mr. J. A. Baker,
Attorney at Law,
Wewoka, Oklahoma.

Sir:

The Indian Office is in receipt of your letter of November 12, 1912, asking to be advised as to the conclusiveness of the age of Seminole allottees as shown by the enrollment records.

You claim that the printed roll which you purchased of the Commissioner to the Five Civilized Tribes contradicts the Seminole tribal roll now in the custody of one Jackson Brown as to the age of Seminole allottees, and you ask to be advised as to which is correct.

The Commissioner to the Five Civilized Tribes in his letter of November 8, 1912, to you admits that 'the notation in the printed rolls furnished by this office that the age of Seminoles were calculated to December 31, 1899, is in error.'

Section 3 of the Act of Congress approved May 27, 1908, (35 Stat. L., 312) provides as to the age of allottees of the Five Civilized Tribes that 'the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

The question arises as to what are 'the enrollment records of the Commissioner to the Five Civilized Tribes' which are made conclusive evidence as to the age of allottees.

The Department on August 1908, held 'that

in all cases where the age of a minor is given by parents or relatives, the age given relates to the last preceding birthday. The age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment shall be construed, for the purpose of the Government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth, except where the records show otherwise.'

The Department on February 15, 1911, held that 'the enrollment records consist of the tribal rolls, the testimony taken, and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant was based.'

It will thus be seen that the age as given by the applicant in his application if the day, month and year to be given, governs and if only the year is given, which may be disputed, without the day and month, the exact age will have to be determined by the testimony taken.

Respectfully,

(Signed) C. F. Hauke,
Second Assistant Commissioner.

12-RFP-18

* * * * * * * *

Land-Allotments.
3354-1913.
J E D

January 21, 1913.

Error as to age.

Hon. Robert L. Owen,
United States Senate.

Sir:

I have the honor to acknowledge the receipt of your letter of January 9, 1913, in which was enclosed a communication of January 6, 1913, from A. E. Harper of Padden, Oklahoma, in which he alleges that there is an error on the final approved rolls as to his age.

Referring to your inquiry as to whether the error, if there is one, can be corrected, your attention is invited to Section 3 of the Act of Congress of May 27, 1908, (35 Stat. L., 312) which provides as to the age of allottees of the Five Civilized Tribes that—

'The enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of such citizen or freedman.'

The Department has held in view of the provisions of Section 2 of the Act of Congress of April 26, 1906, (34 Stat. L., 137), completing and closing the citizenship rolls of the Five Civilized Tribes on March 4, 1907, and of the provisions of the above mentioned Section 3 of the Act of Congress of May 27, 1908, as to the age and degree of blood of enrolled citizens and freedmen, that the final approved rolls of said citizens and freedman so far as enrollment, age and degree of blood of the enrolled citizens and freedmen are shown thereon are a finality and there is no authority of law for the alteration of the rolls in this respect.

Your attention is invited to the fact that while said Section 3 of the Act of May 27, 1908,

makes the "rolls" of citizens; and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of the tribes for the purpose of determining questions arising under the Act, said Act makes the 'enrollment records of the Commissioner to the Five Civilized Tribes conclusive evidence as to the age of said citizen or freedman.'

The Department on February, 15, 1911, held that 'the enrollment records consist of the tribal rolls, the testimony taken and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant was based.'

The enrollment records being in the possession of the office of the Commission to the Five Civilized Tribes, Muskogee, Oklahoma, it is suggested that you advise Mr. Harper to take up the matter with the Commissioner to the Five Civilized Tribes for the purpose of ascertaining what may be shown by said records.

Mr. Harper's letter is returned herewith.

Respectfully,

(Signed) C. F. Hauke,
Second Assistant Commissioner.

1-REP-20

* * * * * * * *

Land-Allotments.
G R
Age of allottees.

December 23, 1912.

Mr. J. A. Baker,
Attorney at Law,
Wewoka, Oklahoma.

Sir:

In answer to your letter of January 13, 1913, requesting to be advised as to how you are to determine the age of an allottee, you are informed that you will have to ascertain the age of an allottee from "The Enrollment Records of the Commissioner to the Five Civilized Tribes," which consists of the tribal rolls, the testimony taken, and all other papers in connection with the application upon which the decision of the Department and the enrollment of the application was based, where there is any dispute as to the correctness of the printed roll. You can find out what the rolls do actually show by an inspection of the original rolls in the office of the Commissioner of Indian Affairs or exact copy thereof in the possession of the Commissioner to the Five Civilized Tribes, Muskogee, Oklahoma. The Indian Office has not stated that the printed rolls are worthless or are incorrect, and has no reason to believe that they are incorrect. Enclosures returned.

Respectfully,

(Signed) C. F. Hauke,
Second Assistant Commissioner.

1-EVB-26

* * * * * * * * *

Land-Allotments.
16516-13
J E D

February 21, 1913.

Computation of age of Cherokee citizens.
Mr. W. W. Breedlove,
Fairland, Oklahoma.

Sir:

The Office has received your communication of February 5, 1913, as to the computation of the age of a Cherokee citizen.

By Section 3 of the Act of Congress of May 27, 1908, (35 Stat. L., 312) it was provided that,

'The enrollment records of the Commissioner to the Five Sivilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

It has been held by the Department that the age of any citizen or freedman of the Five Civilized Tribes, as given in the application for enrollment, should be construed for the purposes of the Government, as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of birth, except where the records show otherwise. The enrollment records consist of the tribal rolls, the testimony taken, and all other papers considered in connection with the application, and upon which the decision of the Department and the enrollment of the applicant was based. The enrollment records pertaining to citizens of the Cherokee Nation are in possession of the Commissioner to the Five Civilized Tribes, Muskogee, Okla., and application should be made to said Commissioner for any information you

may desire as to what said records show concerning the date of majority of any person whose name is on the final approved citizenship rolls. The Office cannot advise you as to whether said enrollment records would be considered as conclusive proof of the age of a Cherokee citizen in a matter affecting his right to vote as a citizen of the State of Oklahoma.

Respectfully,

(Signed) C. F. Hauke,
Second Assistant Commissioner.

2-MR-18.

* * * * * * * * * *

June 1, 1915.

Secretary of the Interior,
Washington, D. C.

Dear Sir:

In re enrollment records Five Civilized Tribes.

Will you kindly advise us as to the construction placed by your office upon the figuring of the age of allottees in the Five Civilized Tribes when the birth affidavit is on file giving the actual date of birth of the allottee, when the census card showing the age at the date of application for enrollment, which last named date is several months later in the year than the actual date of birth of the allottee, shows the age to have been a certain number of years on the date of application for enrollment, while as indicated by the birth affidavit the allottee would in fact have been a fraction over an even number of years.

In view of the Acts of Congress and decisions of the courts the enrollment records are to be conclusive and any evidence on record

must be taken into consideration. The point on which we desire to be informed is as to whether or not that construction will be adopted which considers the actual age of allottees as shown by the affidavit of birth, or the arbitrary age established by the census card made up from the testimony taken at the time of enrollment in cases where the census card would indicate the allottees not to be of age until several months after the date indicated by the birth affidavit.

Thanking you for the information,

Respectfully yours,

Gum Brothers,
By H. L. Norris.

NJ
Land—Five Tribes
62186-1915
J E D

* * * * * * * *

Computation of age of citizens of the Five Civilized Tribes.

June 8, 1915.

Messrs. Gum Brothers,
Oklahoma City, Oklahoma.

Gentlemen:

The Office has received your communication of June 1, 1915, in which you make inquiry as to the method of computation of the age of allottees of the Five Civilized Tribes, and especially as to the determination of the date of birth.

By Section 3 of the Act of Congress of May 27, 1908, (35 Stat. L., 312) it was provided that:

'The enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

It has been held by the Department that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment should be construed for the purposes of the Government as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of birth, except where the enrollment records show otherwise. The enrollment records consist of the tribal rolls, the testimony taken and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant were based.

If you will furnish the name and roll number of the allottee you have in mind, the matter will be examined into, and you will be furnished such information as may seem appropriate in that particular case.

The enrollment records pertaining to the citizens and freedman of the Five Civilized Tribes are in the possession of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, and application should be made to said Superintendent for any information you may desire as to what said records show concerning the date of majority or date of birth of any person whose name is on the final approved citizenship roll.

Respectfully,

(Signed) E. B. Meritt,

Assistant Commissioner."

CONTRACT OF FEBRUARY 8, 1911

The Court erred in holding that the contract of February 8, 1911, was a sufficient oil and gas lease, and was not void for having been given before the enrollment records showed petitioner to have reached the age of 21 years.

It will be noticed that the working contract of February 8, 1911, nowhere refers to the lease of August 24, 1909. There is no suggestion within its limits of the existence of any such original lease and it is apparent that it was the purpose of the draftsman to avoid having it appear that it was intended as the ratification of a forbidden contract, but it was intended to stand on its own base. Nor is there a single word of conveyance or operative word of lease or sale in the contract, but it is a bare partnership agreement, ineffective to convey any interest in the oil or gas or in the allotment itself, and it is to be noted that it is a contract, not between the original lessee and lessor, but between Gilcrease, McCullough and Martin and provides for operation of the property and a division of the proceeds, prescribing that the proceeds of the lease shall pay for its equipment, and as no equipment was had prior to that date and lessees were just going into possession on that date, it is apparent that Gilcrease should pay for all equipment; but that Gilcrease, McCullough and Martin should be the owners of it, and not only of the equipment to be placed upon the premises from the production,

but also all that was then on the premises.

There is not a penny of consideration for this contract. The evidence shows that no one but Gilcrease put up a penny for this equipment. One thousand dollars was required by the Supply Company and Gilcrease gave his note for it and the balance was paid out of the proceeds of the oil from the premises. The original lease did not provide for the lessees becoming the owner of the material on the grounds left thereby the previous lessee and which he must leave under his department lease, amounting to between $40,000.00 and $60,000.00 in value according to the uncontested evidence in the case.

As above stated, this working contract contains no apt or operative words of conveyance. Oil was discovered and a vested niterest in oil and gas existed. We say, therefore, that this instrument is insufficient to create an estate or convey any rights to McCullough and Martin. It is to be remembered that the original lease at least was absolutely void and this working contract is nothing more than an *habendum* clause of a deed or lease, and nothing is better settled in the law than that the *habendum* clause of a deed conveys no estate and will not enlarge an estate already conveyed; nor will it operate by estoppel.

The instrument in form providing that the parties "Shall have and hold" is the ordinary form

of the *habendum* clause of a deed, and it is uniformly held that such a clause, where the granting clause is insufficient, is ineffective to create an estate.

In *Brown* v. *Mantor*, 53 Amer. Decisions, 223, the Supreme Court of New Hampshire discussed an alleged conveyance in which the granting clause of premises was deficient and did not contain necessary operative words of conveyance, but which was followed by the *habendum clause*, "To have and to hold the premises to them, the said Silas and Lemuel, their heirs and assigns forever," and the Court said that on account of the absence of operative words of conveyance the *habendum* was insufficient; that nothing could be conveyed thereby and the instrument was void as a conveyance. The case is exhaustive in its review of the authorities and clear in its logic. So in *Thompson* v. *Gregory*, 4 Amer. Dec. 255, there was an attempted grant of an incorporeal hereditament, but on account of the insufficiency of the granting clause, the conveyance was held void. So in *Ingell* v. *Nooney*, 2 Pick. 362, the Court held that where the *habendum* was sufficient in form, that is to say, "To have and to hold," but the operative words of conveyance were such only as were suitable for a transfer of personal property and were not such as were used for the conveyance of real estate, that real estate would not pass thereby. So in *Sharp* v. *Bailey*, 14 Ia. 387, the Supreme Court of that state lays down

the rule as absolute that operative words of conveyance are necessary to the transfer of an interest in realty. The Court says:

> "But another principle obtains and is applicable, that a deed must contain operative words sufficient to convey the interest of the person conveying it. Otherwise the title will not pass. So the rule is laid down. An instrument purporting to be a deed will be effectual if it contains in any part apt words of conveyance, but if no words importing a grant can be found therein it will be deemed void although in other respects formal and regular."

Hulleman v. *Mounts*, 87 Inda. 178;

Webb v. *Mullens*, 78 Ala. 111.

In the last case the Court said:

> "The title to land will be transferred from one person to another only by positive and appropriate language. It was not the intention of the statute to dispense with the use of any words whatever operative to convey. By the statute the duty is imposed upon the courts to liberally construe the words employed in the conveyances as words of transfer and give them effect and operation according to the intention of the grantor. There must, however, be some words intended as words of conveyance. They can not be supplied by judicial interpolation."

And in the former case Mr. Justice Elliott says:

> "It is also true that if no such words (op-

erative words of conveyance) are used, it will be deemed utterly void of force."

From these authorities it is apparent that the so-called ratification or working contract gave no interest in the oil or gas and no interest in the land and as the original lease was, under all the authorities, absolutely void, this instrument becomes itself wholly ineffective for any purpose.

RATIFICATION

The authorities heretofore cited, would seem to settle the effect of such a lease, and establish the proposition that the lease is void, but the contention is that it was void only in the sense of being voidable and was subject to ratification.

The trial court held that the contract of February 8, 1911, ratified the void lease of August 24, 1909.

The Supreme Court of Oklahoma held in effect that the lease of August 24, 1909, was void and could not be ratified but that the contract of February 8, 1911, was a new lease.

The defendants contend that the purchase, by the petitioner, of defendant Martin after he was of age, according to the enrollment records, and the fact that he signed the division orders for the running of oil, and accepted money for his part, was ratification of the lease and of the contract of February 8, 1911.

We take it to be unnecessary to cite to this court the numerous decisions upon the invalidity of these leases and conveyances by Indians before the removal of restrictions, or upon lands which were restricted, but we shall undertake to present to the court the authorities making the distinction between void and voidable acts, leases and deeds, and to show that by the general rules of construction, the term void, when used in connection with transactions such as we have here, means absolutely void, and not susceptible of ratification, but before passing to that proposition, we desire to call the attention of the court to the fact that provision of the Act of June 30, 1902, which provided that any agreement or lease of any kind or character violative thereof, shall be void and not susceptible of ratification in any manner, and that no rule of estoppel shall ever prevent the assertion of its validity, is still in force.

It will be contended, as has been determined by the Oklahoma court, that the Act of May 27, 1908, undertakes to supplant all existing laws as to the imposition of restrictions, and that the subject matter of the said Act of May 27, 1908, is comprehensive in determining what the restrictions in the future shall be, and therefore may be considered as repealing all existing laws fixing restrictions, but it will also be noted that in the said first section of the Act of May 27, 1908, which undertakes to fix the scope of the act, and upon which reliance is made for the

unquestionably correct rule that it supplants the former acts as to restrictions, that the language is:

> "From and after 60 days from the date of this act, the status of land allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrance, be as follows:"

This Act therefore only undertakes to fix the status of the land as to restrictions, that is, as to what the restrictions shall be, and does not attempt nor purport to cover the subject as to what the effect of the restrictions is, or should be, but to determine the period of the restriction and the lands subject to the restrictions. The Act does not purport to be comprehensive upon all subjects of Indian titles among the Five Civilized Tribes, nor to limit the effect of any other Act affecting these Indian lands, except so far as they fix the period of restrictions and determine upon what lands restrictions shall exist, so that the omission from the Act of May 27, 208, of language to the effect that any agreement or conveyance violative thereof should not be susceptible of ratification, and that no rule of estoppel shall ever prevent the assertion of their invaldity, not only furnishes no ground or basis for argument that such conveyances are to be treated as voidable only, but leaves in full force and effect the provisions of the former Act that such conveyances and incumbrances are absolutely void and not susceptible of ratification.

In addition to this, it is to be noted that the Act of May 27, 1908, which governs these lands and affects this lease, says that the same shall be "absolutely null and void." Stronger language cannot be found in the English.

Without dwelling further upon this proposition, we call the attention of the court to the rule that, ACTS OR CONTRACTS, DEEDS, LEASES OR CONVEYANCES IN VIOLATION OF THE LAW, OR OF PUBLIC POLICY, ARE ABSOLUTELY VOID AND NOT MERELY VOIDABLE, AND ARE NOT SUSCEPTIBLE OF RATIFICATION.

The contention that the lease to McCullough or the contract of February 8th, 1911, could be ratified by Gilcrease overlooks the distinction between contracts voidable for want of capacity and those void because in contravention of a statute or public policy declared by law.

The Oklahoma court recognizes this rule in *Pruitt* v. *Oklahoma Steam Bakery Company*, 135 Pac. 730, 39 Okla. 509, where the court said:

> "Certificates of stock issued in violation of statute are wholly valueless, and void, without respect to the intent of the parties to overissue. Ratification in its correct sense is impossible equally of illegal and void contracts, and contracts of a corporation to issue stock in excess of the amount authorized by its charter is not voidable only, but wholly void,

> and cannot be ratified by either party; no performance on either side can give the unlawful contract any validity or be the foundation of any right of action based upon it."

The opinion cites *Paige on Contracts,* Section 511, and many decisions in its support.

So in *Harris* v. *McCraig,* 105 Pac. 558, the Supreme Court of Idaho held that any agreement, oral or written, whereby a homestead entryman agreed to convey part of the homestead, is absolutely void and not susceptible of ratification after the reception of the patent, and supports the decision with a long list of authorities to the same effect. The United States Statute requires the homestead entryman in making his final proof to subscribe an affidavit that he has not directly or indirectly alienated or agreed to alienate the land or any part thereof. In the last mentioned case, the court held that an action brought upon such a contract should be dismissed by the court whenever the illegality appeared in the evidence, whether relied upon by the defendant, or in any manner pleaded or not.

In *Cornelius* v. *Murray,* 31 Okla. 174, 120 Pac. 653, the court held that because of the provision of the Act of Congress of July 1, 1902, forbidding the enclosing of Choctaw and Chickasaw lands beyond a certain amount, that the agreement to sell the improvements and possession of lands held in violation of this Act was absolutely void, and fur-

nished no consideration for the promises to pay therefor, following the former case of *McLarthlin* v. *Ardmore Loan and Trust Co.*, 21 Okla. 172, 95 Pac. 779.

In *Garst* v. *Love*, 6 Okla.. 46, 55 Pac. 19, the Supreme Court of Oklahoma Territory laid down the rule that because enclosures of public lands were against the public policy, that a contract by which a party was to and did receive and pasture cattle upon the lands enclosed in excess of the amount permitted by the Federal Statutes was absolutely void.

In *Pinney* v. *First National Bank of Concordia*, 68 Kan. 223, the Supreme Court of Kansas lays down the rule that:

> "It is a settled doctrine of the common law that contracts made in violation of statutes are void, and this is so although the statute may not expressly so declare."

This was held in a case of a promissory note taken for a patent right without inserting the words "given for a patent right" in the note, and the note was held so void that a transferee could acquire no title to it.

So the Circuit Court of Appeals of the 7th Circuit, in the case of *E. St. Louis Connecting R. R. Co.* v. *Jarvis*, 92 Fed. 735, held:

> "That a lease of a competing or parallel railroad, where prohibited by the Constitution,

> is void *ab initio* so that no action can be maintained upon a covenant therein, notwithstanding the lessee has had the possession of the lease, since the void contract cannot be ratified."

In *Maxwell on Interpretation of Statutes,* 2nd Ed., p. 256, the rule is stated thus:

> "In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word voidable would be understood as voidable only at the election of the person for whose protection the enactment was made, and who are capable of protecting themselves, BUT WHEN THE PERSONS ARE NOT CAPABLE OF PROTECTING THEMSELVES, OR WHEN IT HAS SOME OBJECT OF PUBLIC POLICY IN VIEW IN REQUIRING A STRICT CONSTRUCTION, THE WORD RECEIVES ITS NATURAL FULL FORCE AND EFFECT."

In *Hagin* v. *Wellington,* 52 Pac. 909, the court laid down the rule that a note given in ratification and consummation of a contract, void as against public policy, was itself void.

In *Puckett* v. *Alexander,* 8 S. E. 767, the Supreme court of North Carolina held that an express promise to pay for services rendered under an employment which was contrary to public policy and forbidden by law, it being the employment of an unlicensed physician, was void, and the court says:

> "If the contract between two persons be void, and not merely voidable, no subsequent express promise will operate to charge the party promising even though he has derived a benefit from the contract."

So in *Wilcox* v. *Edwards,* 123 Pac. 276, the Supreme Court of California holds that a contract made in violation of public policy is so void that it is not validated by a subsequent repeal of the law which made it invalid, and cites extended list of authorities to support the doctrine.

So in *Handley* v. *St. Paul Globe Publishing Co.,* 16 Am. St. Rep. 695, 41 Minn. 188, the Supreme Court of Minnesota held that the publication of a newspaper on Sunday was unlawful, and hence a contract concerning advertisements therein was void, and was not susceptible of ratification, even if the law was so changed after the contract was made, and before it was fully performed, as that it would no longer be void.

In *Bishop* v. *American Preservers Co.,* 157 Ill. 284, 48 Am. St. 317, the court held that a contract void as against the anti-trust laws could not be ratified, and although partly performed, constituted neither a cause of action nor a ground for defense when it had to be relied upon by the party.

In *Diving et al.* v. *Perdicaries,* 96 U. S. 193, 24 L. Ed. 654, the Supreme Court of United States says:

> "A thing void as to all persons and for all purposes can derive no strength from confirmation."

And so in *United States* v. *Grossmayer*, 76 U. S. 72, the court again says:

> "A transaction originally unlawful cannot be made any better by being ratified."

In *Boutelle* v. *Melendy*, 49 Am. Dec. 152, the court says:

> "An illegal contract can neither be ratified nor become the consideration for a subsequent promise."

This was held in the case of an action of assumpsit for the price of a horse and harness sold to the defendant, the property being at the time subject to a mortgage, and the law of New Hampshire forbade the sale of mortgaged property without the consent of the mortgagee.

So in *Lancaster County* v. *Fulton*, 18 Atl. Rep. 384, the Supreme Court of Pennsylvania holds that a contract void as against public policy, although not directly forbidden by statute, cannot be ratified by acquiesence, or otherwise.

In *Birkett* v. *Chatterton*, 43 Am. Rep. 30, the Court lays down the rule that no action lies to recover a minor's wages earned in an employment in which the statutes forbid minors to be engaged.

In *Fowler* v. *Scully*, 13 Am. Rep. 609, the Su-

preme Court of Pennsylvania lays down the rule that because the National Currency Act forbids the taking of securities for monies thereafter to be loaned, that a mortgage given to a National Bank to secure notes thereafter to be discounted was absolutely void.

In *Union Pacific R. R. Co.* v. *Kennedy,* 20 Pac. 696, the court held that a contract void as against the pre-emption laws was not susceptible of ratification, and that a subsequent contract based upon it is void, and it will be noticed that the pre-emption laws do not fix any penalty for the violation thereof, nor declare the contract to be void if violative thereof, but simply prohibits the entry of land by one person for the benefit of another, and the contract in the case cited was held violative of that provision although only incidentally so.

In *Howell, Administrator,* v. *Fountain et al.,* 46 Am. Dec. 415, the Supreme Court of Georgia holds that a contract is void and not susceptible of ratification where it is in violation of the policy of a treaty between the Creek Indians and the United States. This case is very instructive and lengthy. The contract involved the title to a tract of land that was restricted as follows:

> "These tracts may be conveyed by the person selecting the same, to any other person for a fair consideration, in such manner as the president may direct. The contract may be certified by some person appointed for that

> purpose by the president, but shall not be valid until the president approves the same."

The contract was made in violation of this provision, and as the Supreme Court of Georgia says:

> "It is a contract in breach of a treaty, and therefore illegal and void. It was in contravention of public policy, the policy, to-wit, of humanity and justice to the Indians; the policy which our government has avowed from the beginning, and therefore void."

This decision shows clearly what it would seem it was not necessary to argue at this date, that the restrictions upon Indian lands are not only made for the benefit of the individual Indian, but that they are matters of public policy, which cannot be contravened, and that contracts made in breach or violation of these restrictions belong to that class of contracts that cannot be ratified, because public interest and public policy are involved, as well as the protection of those presumably incapable of protecting themselves.

In *Bank of Rutland* v. *Parsons,* 21 Vt. 199, the court says:

> "Where the statute prohibits anything to be done, an act done in contravention of this prohibition must be adjudged inoperative and void if the statute cannot otherwise be made effective to accomplish the objects intended by its enactment."

In *Petitt* v. *Petitt,* 32 Ala. 238, the court held that a contract between a Chickasaw Indian who was entitled to a reservation under the treaty of 1832, and a white person, by which the former agreed to sell his reservation to the latter in the event the treaty be so modified as to permit such sale, and in case of no such alteration, to allow the latter to occupy the land for two years free of rent, is void as being contrary to the treaty.

The case of *Cox* v. *Grubb,* 28 Pac. 157, is very strongly in point. A contract was made between a surviving partner and the widow of the deceased partner who left minor children, and part of the individual creditors of the deceased partner, that the surviving partner should pay a proportionate share of the individual indebtedness of the deceased partner and retain all the partnership property, and the court held that such a contract was illegal and void, and that further promises made by the surviving partner in pursuance of such agreement to pay a proportionate share of the debts was void as founded on an illegal contract. The court said:

> "The cases cited go upon the theory that such a contract is against public policy, for the reason that the statutes provide a tribunal whose duty it is to supervise the settlement of the estates of all deceased persons, and whose special duty it is to protect the interest of minor children and heirs. No contract can be made respecting the assets of a deceased person's estate, except by the authority and with the approval of the probate court. The law

> fixes the manner of administration; it imposes certain restrictions upon the sale of the assets of the state. No person interested in the estate can by contract, assent or silence create other methods of selling the assets of the estate than those prescribed by the law."

The argument in this case is absolutely applicable to the case at bar. The Act of 1908 provides a tribunal that shall have the supervision of the estates of minors, which is, that they shall be subject to the jurisdiction of the probate courts of this state, and this Act has been construed by this court as putting a positive restriction upon the lands and providing a tribunal through which only they can be sold. And it is more clearly a matter of public policy that the statute should be enforced and rigidly construed, for the benefit of the Indian minor, than that the policy of the laws of administration should be so construed when the contract that contravenes them is made by *persons sui juris.* The Kansas Court sustains its position by the case of *Ravenscraft* v. *Pratt,* 22 Kan. 20, and by *Specht* v. *Collins,* 16 S. W. 934, from the Supreme Court of Texas.

In *Gray* v. *Hook,* 4 N. Y. 449, the Supreme Court of New York held that a contract entered into for the purpose of carrying into effect any of the unexecuted provisions of a previous illegal contract, is void, and this although the contract is not declared void by statute, but is void only as a mat-

ter of public policy, as where two persons are applicants for appointment to office, and one agrees to withdraw his application in consideration of a division of the fees, and in this case, there was a new, valid, subsequent consideration, but the subsequent contract was founded in part upon the illegal contract.

In *Morrison* v. *Bennett,* 52 Pac. 553, the Supreme Court of Montana discussed the question of ratification and validity of contracts founded on a former illegal contract, and quoting from the last decided case, says:

> "The distinction between a void and valid new contract in relation to the subject matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract."

In *Tandy* v. *Elmore-Cooper Live Stock Com. Co.,* 87 S. W. 614, the court held that a note given in payment for pasturing of cattle on land enclosed in violation of the Act of Congress prohibiting the maintenance of any fence enclosing more than 160 acres of public domain, was void and that a guaranty thereof was void though the guaranty was given to secure the possession of the property, where the matter had been arbitrated, fixing the amount of the note, after full consideration had been received in the pasturing of the cattle.

In *Reummeli* v. *Cravens*, 74 Pac. 908, the Supreme Court of Oklahoma Territory holds that a contract by which one agrees to procure a license in his own name to sell intoxicating liquors, and to sell the liquors of another who is a non-resident of the State, as agent, is utterly void, and that an action of accounting cannot be maintained by the principal to recover monies which the agent had failed to account for, and which the agent had wrongfully embezzled. The court says that the intention of the parties was immaterial and that it was immaterial whether the contract was directly prohibited or arose collaterally out of a transaction prohibited by statute, and that contracts in violaion of law are void whether they are *mallum in se* or merely *malum prohibitum*, for the rule is extended to such as are calculated to affect the general interest and policy of the country.

So in *Arnett* v. *Wright*, 89 Pac. 116, the Supreme Court of Oklahoma Territory held that the sale and transfer of a city license to sell intoxicating liquors is prohibited by law, and that where a note is given, part of the consideration for which is the sale of such a license, the same is absolutely void, as is also any security given for such note.

In *Miller* v. *Ammon*, 145 U. S. 420, 36 L. Ed. 759, the Supreme Court of the United States says:

> "It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be im-

> plied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

This was held in a case of contract for the sale of liquors in violation of a city ordinance.

In *Church* v. *Proctor*, 66 Fed. 240, the Circuit Court of Appeals for the 1st Circuit laid down the rule that a contract as against public policy was void and no rights could arise out of the same, and this was held in a case where the contract was to supply a person who intended to violate the law with the supplies, and by the sale of them, although the person furnishing the supplies took no part in the illegal purpose and violated no statute.

In *McCanna and Fraser Co.* v. *Citizens Trust Co.*, 74 Fed. 597, it was held that where a foreign corporation has not complied with the provisions of the law making registration a condition precedent to transacting business, that it cannot recover upon a bond given by its agent given for the faithful performance of his duty.

In *Short* v. *Bullion-Beck & Champion Mining Co.*, 57 Pac. 720, the Supreme Court of Utah holds that where a person is employed in violation of the Eight-Hour law, he cannot recover either upon an

express or implied contract to pay for services beyond the limit of the eight hours day's work.

In *Elliott on Contracts,* section 19, page 22, the statement is made:

> "A void contract is incapable of ratification in the true sense."

In *Elliott on Contracts,* Sec. 648, the author says:

> "Contracts prohibited by statute are, as a general rule, void, notwithstanding the statute does not expressly declare them to be so."

And in Section 647, he says:

> "A contract may be illegal even though it does not contravene the specific directions of a statute if it be opposed to the general policy and intent of the statutory law. The statutory prohibition may be either express or implied."

And in Section 646, he states the rule:

> "It is immaterial whether such agreement is forbidden by the Constitution of the United States, or of a state, by statutory enactment, state or federal, by a United States treaty, by the ordinance of a city, by the common law, or whether the thing forbidden is *malum in se* or *malum prohibitum.*"

In Sections 651, 652 and 1089 of the same writer, the rule is laid down that where the statutes indicate the policy of the law to be that a certain class

of acts shall not be done, or a certain class of contracts shall not be entered into, except upon certain conditions, as for instance, contracts and acts within the evil attempted to be corrected by the Interstate Commerce Law, are absolutely void and therefore not susceptible of ratification, and that all contracts in contravention of public policy, or that constitute a part of the evils that the statutes were enacted to correct, are absolutely void, and cannot be ratified.

It is to be noted that there is a distinction, and always has been a distinction as to contracts of infants being void or voidable, depending upon whether or not the statute undertook to regulate or prohibit them, and in all cases where a statute existed, either directly prohibiting the making of a contract or in general terms regulating it, a contract made without observance of the regulations, or against the prohibition, has been held void, and not susceptible of ratification, even though the statute did not expressly declare the contract void. A recent case of this character is *Hakes Investment Co.* v. *Lyons*, 137 Pac. 911.

This case is from the Supreme Court of California, and is founded upon their statute, identical with our own, which provides:

> "A minor cannot give a delegation of power, nor, under the age of 18, make a contract relating to real property or any interest therein, or relating to any personal property not in his immediate possession or control."

The court says that on account of the policy expressed in the statute, that a deed of a minor 14 years of age is absolutely void, and the land conveyed may be recovered 28 years later in an action for that purpose. The court says:

> "As this deed was absolutely void, the doctrine of ratification has no application. The effect of ratification is to prevent the party from afterwards disaffirming the contract. This, of course, necessarily implies that but for the disaffirmance, the contract would be binding. Where the contract is not binding in any event, but is utterly void from the beginning, no ratification can make it valid. * * * The deed being wholly void, it cannot of its own force operate as an estoppel, nor can the fact that it was duly recorded operate as an estoppel. Estoppel cannot validate a void deed."

The same statute was in force in Dakota, and the Supreme Court there held in *Wambold* v. *Foote*, 2 N. W. 239, that a power of attorney given by a minor was absolutely void and that no rights could be acquired thereunder as distinguished from being merely voidable.

So in Connecticut the statute provided that no person under the government of a parent, guardian or master shall be capable to make any contract or bargain which in the law shall be accounted valid unless the said person be authorized or allowed so to contract or bargain by his or her parent,

guardian or master, in which case such parent, guardian or master shall be bound thereby. The Supreme Court of Connecticut in *Alsop* v. *Todd*, 2 Root 105, held that contracts of such minors were absolutely void, and of no effect, and reaffirmed the doctrine in *Rogers* v. *Hurd*, 4 Day 57, 4 Am. Dec. 182.

These cases are cited to show that where the law has undertaken to carry out the policy of restricting the control of his property by a minor that non-compliance with such restrictions renders his act of control absolutely void, as in violation of that public policy, and so in the case at bar, it has been decided repeatedly by the Oklahoma Supreme court, and the decisions affirmed by the United States Supreme Court, that the law did restrict the control of a minor Creek Indian over his allotments and forbade his leasing the same, and that it is therefore a matter of public policy, and contracts in violation thereof are absolutely void.

The court said in *Collins Investment Co.* v. *Beard*:

> "These statutes show that Congress had the one fixed and permanent policy running through it, which was to safeguard and protect these Indians against their own improvidence,"

and in *Rogers* v. *Noel*, 34 Okla. 238, 124 Pac. 976, the court said:

> "The deed being void when made by force of the statute, the rule of law applicable to voidable conveyances can have no application,"

and in *Tirey* v. *Darneal,* 133 Pac. 614, which case is expressly approved by the Supreme Court of the United States in *Truskett* v. *Closser,* this court said:

> "If the deed was void, the rule of law urged by counsel for plaintiffs in error with reference to voidable contracts has no application."

So with reference to contracts of a married woman. They are held to be absolutely void and not susceptible of ratification, because in contravention of the policy of the law. As said by the court in 1 Lansing 101:

> "All there is consists of her promise to pay the debt of her husband in the form of a promissory note, made while he was living and cohabiting with her, and supporting his family, and her promise to pay such note after his death. The note when given was absolutely void, having no foundation either in law, equity, conscience or good morals, and a subsequent promise to pay such note was equally void."

So in *McFarland* v. *Heim,* 127 Mo. 327, 48 Am. St. 629, the court held that a married woman is not capable of contracting unless the power is expressly given her by statute, and that a lease

granted by her, or by an agent appointed by her, was absolutely void, and that she could not ratify it.

So in *Nesbit* v. *Turner,* 155 Pa. St. 429, the court held that a bond of a married woman was absolutely void and a ratification after her discoverture did not make the bond binding upon her. The court says:

> "If, therefore, in 1873, when discovered, she simply acknowledged her signature, it was not sufficient to make her liable upon it."

So it has universally been held that conveyances of homesteads by one spouse in whom the legal title rested was absolutely void in cases where the statute required both spouses to join in a conveyance.

These decisions all run upon the proposition of policy of the law being declared that the homestead should not be conveyed except by the joint consent and action of both spouses, and such statutes amount to just such a restriction upon the right of alienation as exists in the case at bar.

In *Burck* v. *Taylor,* 152 Fed. 632, 38 L. Ed. 649, the court says on page 649 of the official report:

> "But it has never been doubted that as a general rule, a contract made in contravention of the statute is void, and cannot be enforced, and the only exception arises when from an examination of the statute, courts are able to

discern a different or limited purpose on the part of the law-makers."

In *Parke Davidson Co.* v. *Mullett,* 149 S. W. 461, the Supreme Court of Missouri laid down the rule:

> "That a transaction of business in this state by a foreign corporation which has not complied with the conditions precedent prescribed by the Revised Statutes of 1909, is unlawful and contrary to the state policy and every contract in furtherance of such business is void and subsequent compliance with the statutes would not validate the contract."

The court held in *Howard* v. *Farrar,* 29 Okla. 490, 114 Pac. 695, that a conveyance of lands in violation of the restrictions imposed by Congress was void, and that a note executed by the Indian to purchase for the purpose of indemnifying him against the loss in the event that the grantor failed to convey the said land after the restrictions are removed is also void, and recovery thereon cannot be had, though the purchaser paid the purchase price of the land at the time of the agreement and sale, and the court said:

> "Courts as a general rule will not aid a party to enforce an agreement made in furtherance of objects forbidden by law, or the general policy of the state, or to recover damages for a breach, or when the agreement has been executed by the payment of money to recover it back,"

and the restrictions on the land in that case were not as broad as in the case at bar, if the word "Absolutely" in the statute under consideration is to be given any force, for the restriction there reads:

> "That all contracts looking to the sale or incumbrance in any way of land of an allottee, except the sale heretofore provided, shall be null and void."

In *Lingle* v. *Snyder,* 160 Fed. 627, the Circuit Court of Appeals of this circuit held that a contract that contravened the settled public policy of the state or nation is void, and no right of action can be predicated upon it, and this was held in a case where the law did not declare such contracts void, but only forbade enclosing of the public domain, and the contract was one for pasturing on enclosures on the public domain.

In *Standard Fashion Co.* v. *Grant,* 81 S. E. 606, the Supreme Court of North Carolina holds void a contract entered into without the state by which the purchaser agreed not to handle the goods of a competitor, it being the policy of that state as provided by statute that sales upon such conditions are not permitted.

And so in *McNeill* v. *Durham & C. R. Co.,* 47 S. E. 765, the Supreme Court of North Carolina holds that because giving of free transportation is contrary to the law, that a person riding upon a pass is in fact a passenger and the conditions of

the pass bind neither him nor the railroad company.

So in *United States* v. *Deitrich,* 126 Fed. 671, the court in considering a contract affected by an Act of Congress which provides:

> "All contracts or agreements made in violation of this section shall be void,"

held that a contract lawful in its inception was avoided by such a statute and that the word "void," while susceptible of different meanings, is obviously used in the sense of null and of no effect from the beginning, and not admitting of ratification.

So in *Cumberland Telephone and T. Co.* v. *City of Evansville,* 127 Fed. 187, the court held that a contract which is illegal as contrary to public policy is absolutely void, and may be attacked by anyone, and in any proceeding in which it is sought to found rights thereon.

This was held in a case where the public policy contravened by the sale complained of disabled the Telephone Company from performing its public duties and franchises.

In *Bass* v. *Smith,* 12 Okla. 485, 71 Pac. 628, the Supreme Court of Oklahoma, speaking by Mr. Justice Hainer, held that no rights could arise out of a contract to convey the lands to be acquired under the homestead law. This decision is supported by

numerous citations of authorities.

In *St. Louis Fair Association* v. *Carmody,* 151 Mo. 556, the Supreme Court held that a contract whereby an association sells the privilege furnishing cigars and liquors and other refreshments in and about its grandstand, where the grandstand was maintained in connection with a race track scheme of which gambling booths constituted part, was against public policy and was invalid because the statute forbade the maintenance of gambling booths.

In *Westerlind* v. *Black Bean Mining Co.,* 203 Fed. 599, the Circuit Court of Appeals of the 8th Circuit, in considering the Colorado statute providing that mortgaging or incumbering the general properties of a mining corporation should be void without it was ratified by the stockholders, says:

> "An act or contract declared to be void by statute which is *malum in se* or against public policy, is generally utterly void, and incapable of ratification,"

and that therefore the fact that the stockholders seeking to avoid a lease given without the ratification of the stockholders, but which the petitioning stockholders voted to ratify, was so void that such stockholders were not by their vote estopped to assert the invalidity of the lease.

The court further says:

> "Words and phrases should be given their popular sense and meaning unless there is a clear indication that they were used in a different sense. The popular sense of a word or phrase is that sense which people conversant with the subject matter with which the statute is dealing would attribute to it. The legal presumption is that words and phrases in a statute are used in their usual and customary sense unless it clearly appears that the Legislature intended to use them in a more restricted or different sense."

Certainly it must be considered that the popular idea of the phrase "absolutely null and void" is that the subject to which it applied has no force or effect whatever.

In *Hardy et al.* v. *Samuels et al.,* 122 S. W. 654, the Supreme Court of Arkansas holds that an agreement by one to enter under the laws of United States, lands for homestead for the benefit of another, is against public policy and utterly void.

In *Calfflin* v. *Boorum,* 25 N. E. 360, the Court of Appeals of New York holds that a note payable to the maker's own order and by him placed with a broker to be disposed of for the maker's benefit, is usurious when sold at a discount which amounts to more than the legal interest and is void under the statute declaring all bills, notes and other obligations on which more than the legal rate of interest is taken or reserved, to be void, and further holds that such note is not validated by passing into the

hands of an innocent purchaser for value. The court says:

> "A note void in its inception continues void forever, whatever its subsequent history may be. It is as void in the hands of an innnocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade. Even the principle of estoppel does not render such note valid."

For further authorities that the plaintiff was incapable of making any valid contract with reference to these lands, see:

Belle v. *Cook,* 192 Fed. 597;

Yarbrough v. *Spaulding,* 31 Okla. 806, 123 Pac. 843;

Kirkpatrick v. *Burgess,* 29 Okla. 121, 116 Pac. 764;

Alfrey v. *Colbert,* 104 S. W. 639;

Colbert v. *Alfrey,* 168 Fed. 231;

Barnes v. *Stonebraker,* 28 Okla. 75, 113 Pac. 903;

Sharp v. *Lancaster,* 23 Okla. 349, 100 Pac. 578;

Eldred v. *Okmulgee L. & T. Co.,* 22 Okla. 742, 98 Pac. 929;

Williams v. *Steinmetz,* 16 Okla. 104, 82 Pac. 986;

Simmons v. *Whittington*, 37 Okla. 356, 112 Pac. 1018;

U. S. F. & G. Co. v. *Hansen*, 129 Pac. 60;

Dood v. *Cook*, 137 Pac. 348;

Campbell v. *Mosley*, 38 Okla. 374, 132 Pac. 1098;

Freeman v. *First National Bank*, 143 Pac. 1165;

Reid v. *Taylor*, 144 Pac. 589;

United States v. *Leslie*, 167 Fed.. 670.

In each and every one of these cases the courts have held that conveyances of restricted lands are void, and in a great number of them and in each of them in which there has been occasion to distinguish between void and voidable contracts, they have held the conveyances absolutely void, and not susceptible of ratification. It would seem, therefore, that there is absolutely no basis for the contention in this case that there could have been a ratification of the void instrument, particularly as the ratification relied on, to-wit, the contract of February 8, 1911, which contains no operative words of conveyance, but is founded on the former transaction, and simply provided for the operating of the lease and divisions of the proceeds under the original lease, was itself made four months before Gilcrease became of age, as shown by the rolls, and as said by the Supreme Court of Indiana in *Brown* v. *First National Bank*, 37 N. E. 158:

> "The fact that a party to a contract which is void as against public policy has received the benefit therefrom, does not estop him."

Cases may be cited indefinitely to the effect that contracts forbidden by statute are void, or contracts against public policy of the government either state or national, in respect to any material proposition upon which they have seen fit to legislate, are equally void, and this applies whether the statutes are penal in character, containing no express declaration of the invalidity of contracts or acts in violation thereof, or whether it simply prohibits the act, prohibits the acts or contracts to which the contested contract is merely incidental, and it applies equally where the policy of the government is only implied and not express. We have cited cases of all classes, but have limited our citations to only a portion of those in which some question of ratification was involved, and we have cited so many authorities not to enligthen the court upon the law so much as to show the court how uniform holdings are upon this proposition.

The principal case relied upon by counsel for defendant in the court below is the case of *United States* v. *Wright*, 197 Fed. 297, which is founded upon the case of *United States* v. *Noble*, 197 Fed. 292, and from both which decisions Judge Adams dissented, and as to the substance of which, namely, that overlapping leases for a limited period as allowed by the United States statute, were not void,

has been overruled by the United States Supreme Court. This decision, however, in addition holds that:

> "Where an Indian minor, after reaching majority, redated, re-executed and extended a mining lease upon his allotment, the government had no right to sue to set it aside,"

but it is to be noted in that case that a mere ratification or reaffirmance was not had, but that subsequent to attaining majority, the Indian executed and acknowledged that:

> "The foregoing lease is this day re-dated, re-executed and extended 10 years from the date hereof,"

and that he did this three consecutive times. It is well to note that the terms ratify or confirm or adopt are not used, but the terms were "re-dated and re-executed," that is to say, executed again, and the same is not merely an adoption or ratification of the original lease, but simply the adoption of its terms in a contract then executed.

IN CONCLUSION

While it may be true that this Court cannot consider the equities of this case as a basis for reversal, it can consider the evil here presented as being the evil Congress was aiming to correct by the Act under consideration.

Here was an Indian minor who was possessed of a valuable oil lease with more than forty wells producing thousands of barrels of oil monthly, who in two deals with his attorney, his guardian and his banker, comes out with them owning nine-sixteenths of that property, Thirty Thousand Dollars of his other property, and money for which they are not out a dollar and for which he has nothing to show.

In this state of facts and believing that grievous error has been made, we may be excused for having multiplied authorities upon propositions this Court may consider elementary and for extending this brief in discussion of fundamentals, but we know that the distinction between void and voidable acts with the principles upon which that distinction rests, as well as the inaccurate use of the word "void" is a continuous source of litigation, and difficulty for the courts, and it is with a view of illustrating our contention, rather than furnishing information to the court that we have gone to the extent we have in that matter, as well as in the dis-

cussion of "conclusive evidence" and the effect and nature of Statutes making one fact conclusive evidence of an issue.

In the trial court petitioner was unsuccessful upon the theory that he had ratified a contract voidable because of minority. In the Supreme Court that doctrine was repudiated, but the case affirmed upon the theory that the enrollment record did not show his age and was not conclusive of it. Neither of these theories has ever met the approval of the bar, nor been acquiesced in by the profession, and both destroy all the good aimed at by the Act of Congress and intensify all the evils sought to be removed. Under these conditions we could do no less than we have and can only wish we might do more.

Respectfully,

A. J. Biddison,
Attorney for Petitioner.

RESPONDENT'S

BRIEF

In the

Supreme Court of the United States

THOMAS GILCHRIST, - - - *Petitioner,*

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW and AL BROWN, - - - - - - - - - *Respondents.*

No. 167.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF ON BEHALF OF RESPONDENTS

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ACTS OF CONGRESS

LIST OF CASES

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CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF ON BEHALF OF RESPONDENTS

Statement of Case

This action was commenced by Thomas Gilcrease against G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, in the District Court of Tulsa County, Oklahoma, on the 14th day of February, 1912, by filing his petition in said court on said day and procuring summons thereon to be issued against and served on the defendants in said cause, which petition appears on page 2 to page 27 of the printed record.

The allegations of the petition, in short, are that Thomas Gilcrease was a citizen of the Creek, or Muskogee, Tribe or Nation of Indians, of one-eighth degree of Indian blood, and was enrolled under Roll No. 1505, and, as such citizen, was entitled to receive and had received an allotment of the lands of said tribe, for which he received two patents or allotment deeds—one being for what is known as the "surplus" allotment and one for the "homestead" allotment, the surplus allotment being the South Half of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter of Section Twenty-two (22), Township Seventeen (17) North, Range Twelve (12) East, and the homestead allotment being the Northwest Quarter of the Southwest Quarter of said section, township and range; and that patents or allotment deeds to said land had been issued and approved by the Secretary of the Interior in the year 1902.

It was alleged that the defendants in said action were business men of mature judgment, were friends and business associates; that the plaintiff, at the time of making of certain of the instruments set out in the petition, was a minor in fact and a minor as shown by the enrollment records of the Commissioner of the Five Civilized Tribes, and was without business experience, and, while he was an adult in fact at the time of the execution of some of the instruments set out in the petition, as to such instruments he was a minor as shown by such en-

rollment records. The petition further alleges that confidential relations existed between him and certain of the defendants at the date of the execution of the instruments set out in the petition and during the transactions impeached; that the defendant, H. B. Martin, was his attorney and the defendant, A. E. Bradshaw, was his guardian, and that G. R. McCullough, H. B. Martin and A. E. Bradshaw and Al Brown entered into a conspiracy to defraud him of his land or the oil and gas mining rights therein, and, in pursuance of said conspiracy, procured the execution by Gilcrease of the oil and gas mining lease to G. R. McCullough, dated August 24, 1909, and appearing on page 18 to page 20 of the Record; and, also, as a part of said conspiracy, procured the execution of the contract dated the 8th day of February, 1911, between Thomas Gilcrease, G. R. McCullough and H. B. Martin, appearing on page 23 to page 25 of the Record, by which Gilcrease was to receive an eighth royalty on all oil produced on the premises and G. R. McCullough, subject to said royalty interest, should have a one-half interest in the oil and gas mining leasehold in said land, and the defendant, Martin, should have a fourth interest in the leasehold, and Thomas Gilcrease, in addition to the one-eighth royalty, should have a fourth interest in the leasehold, and providing for the operation of the land for oil and gas mining purposes.

The instruments above mentioned and other in-

struments attacked in the petition as a part of the scheme to defraud were all attacked on the ground of fraud in fact, by which the defendants in said suit entered into a conspiracy for the purpose of securing an oil and gas mining leasehold on said land from Thomas Gilcrease by reason of the influence of Martin, as his attorney, and Bradshaw, as his guardian, over him, for a consideration greatly less than the value of such a lease. The conveyances were also attacked and sought to be set aside on the ground of the confidential relations alleged to exist between Gilcrease, Martin and Bradshaw. They were also sought to be set aside on the ground that, at the time of their execution, Gilcrease was a minor as shown by the enrollment records of the Commissioner of the Five Civilized Tribes.

The case came on for trial on the petition, the answers of the defendants thereto, and the reply of the plaintiff to such answers. On the trial of the case, it appeared that Thomas Gilcrease was born on the 8th day of February, 1890, and, consequently, was of age in fact on the 8th day of February, 1911. (Record, p. 106, marg. no. 362.) It also appeared that he was married, had been in business, and had had his guardian discharged, and that he was desirous of testing the legal question as to whether his marriage made him of age so he could sell and dispose of his property, and, considering that he was competent to transact his bus-

ness, had the District Court of Wagoner County remove his disabilities of nonage, and made a deed of the property to his mother for the purpose of having a suit brought to determine his legal capacity to convey his lands. The deed of Thomas Gilcrease to his mother, executed for the purpose of testing his legal capacity to convey his lands, and the order removing his disabilities of nonage were entered into and had before he was acquainted with any of the defendants in said suit, although, in his sworn reply, in paragraph 4 thereof, page 60, of the printed record, he says that said proceedings were had on the advice and under the direction of H. B. Martin, and in full reliance upon said H. B. Martin as to the validity of the proceeding and as to its being to his best interest and advantage.

On the trial, it appeared that, on the 22d day of October, 1910, McCullough assigned to Thomas Gilcrease a fourth interest in the oil and gas mining lease of the 24th day of August, 1909. (Record, p. 97, marg. p. 303.) And, at said time, G. R. McCullough executed to H. B. Martin an assignment of a like interest. On the 8th day of February, 1911, when Thomas Gilcrease was in fact of age, Martin and Gilcrease and McCullough entered into an instrument called a "contract," which is in effect an oil and gas mining lease, and was held to be such both by the trial court and the Supreme Court, by the terms of which Thomas Gilcrease was

to receive an eighth royalty, to have a fourth interest in the oil produced, and Martin was to have a fourth interest in the oil produced, and McCullough, a half interest in the oil produced, after the paying of the royalty interest, and each of the parties was to pay his proportionate part of the expense of development, but no part of the one-eighth royalty secured to Gilcrease by such instrument was to be liable for any part of the development of the land. This contract is found at pages 99-100 of the Record. After the land had been developed for oil and gas mining purposes, and a large amount of oil produced therefrom, Martin assigned to Gilcrease three-fourths of his interest in the land. This instrument is dated the 11th day of December, 1911, when Gilcrease was of age in fact and also, as he contends, of age as shown by the record. This instrument is found at page 93 of the Record, marg. p. 307. The consideration of this assignment was certain moneys owed by Martin to Gilcrease, and certain real and personal property. The value of the property transferred to Martin by Gilcrease, including the debts liquidated, was the value of the interest in the lease assigned by Martin to Gilcrease, each being of the agreed value of $31,000.00.

On the trial of the cause for the purpose of showing that he was not of age as shown by the records, Gilcrease offered in evidence what is known as the "roll card." This card appears on page 107

of the Record, marg. no. 550, and shows that Gilcrease is nine years of age, but does not show or pretend to show at what time he was nine years of age. The certificate of the Commissioner of the Five Civilized Tribes, however, states that he was enrolled as of June 9, 1899. To further prove that he was not of age as shown by the rolls at the time of making the oil and gas mining leases of August 24, 1909, and of the 8th day of February, 1911, he offered in evidence what is called the "census card," from which it appears that Thomas Gilcrease was nine years of age, but does not show when he became nine years of age, nor does it give the date of his birth, nor does it show when he was enrolled, save that it shows he was enrolled by the Colbert Commission September 1, 1896. There appears in the lower right hand corner of the card the word and figures "June 9/99," which card is certified to as being a correct copy of the enrollment records so far as they appertain to the enrollment of Thomas Gilcrease. This certificate is found inserted between pages 108 and 109 of the printed record.

On the trial of the case, it further appeared that Bradshaw had never been the guardian of Thomas Gilcrease—that is, his general guardian—but that, after Thomas Gilcrease was in fact twenty-one years of age, and after he was married and had a family, and after he had been relieved of the disabilities of nonage by the District Court of

Wagoner County, in order to take down certain moneys belonging to Thomas Gilcrease in the possession of the United States Indian Superintendent, at Muskogee, without resorting to litigation, Bradshaw was appointed special guardian under the Statutes of Oklahoma for the purpose of collecting such money and turning it over to Gilcrease; that he collected said money and turned it over in accordance with his appointment, and performed no other act thereunder.

On the trial of the cause, the District Court of Tulsa County found against the plaintiff on the issue of fraud in fact, found against the plaintiff on the issue of fraud in law implied from the alleged confidential relations existing between the plaintiff and the defendants, or any one of them, and found against the plaintiff as to the lease of August 24, 1909, and the lease of February 8, 1911, being void under the Act of May 27, 1908, holding that, if said leases were in contravention of said Act and could be set aside, the plaintiff, after he became of age in fact and at a date when he would be of age according to the enrollment record as interpreted by the plaintiff, had adopted and ratified such agreements.

An appeal was taken by Thomas Gilcrease to the Supreme Court of Oklahoma; that court holding that the roll card hereinbefore mentioned was correctly admitted in evidence for the purpose of showing the degree of Gilcrease's blood, but that

the certificate of the Commissioner was not evidence as to the date of enrollment. (Opinion of Court, Printed Record, p. 113.) The court further held that the enrollment card or record did not show when Thomas Gilcrease was enrolled, and there was no evidence to show that the date of June 9/99, in the lower right hand corner thereof, was the date of such enrollment, and that it could not take judicial knowledge of what was intended by such words and figures. (Opinion of Court, Printed Record, pp. 112, 113.) The Supreme Court also held that there was no evidence of fraud in the procurement of the instruments of sale. (Opinion of Court, Printed Record, pp. 114-118.) The court further held that plaintiff was of age February 8, 1911, when the second lease was made, and that said lease was valid, and upheld the same, and affirmed the judgment of the trial court. The court further found that there was no evidence sustaining the allegations of conspiracy, and that Mr. Martin never knew of and took no part in the negotiations leading up to the execution of the oil and gas mining lease, and was only consulted in reference thereto by Gilcrease after the making of the lease, when he was requested to prepare a lease to conform with the agreement.

From this judgment of the Supreme Court, affirming the judgment of the District Court of Tulsa County, Oklahoma, the plaintiff, Thomas Gilcrease, has procured a writ of certiorari to the

Supreme Court of Oklahoma, and the cause is brought here for the purpose of reviewing alleged errors in the construction of the Act of Congress of May 27, 1908.

The propositions of law arising on this record, we think, may be fully discussed and presented under the following heads:

Propositions of Law

1. Section 3, of the Act of May 27, 1908, (35 Stat. L. 312) declaring the enrollment records of the Commission to the Five Civilized Tribes to be conclusive evidence of the age of Indian and Freedmen members of such tribes, means age as disclosed by such records, and not that the date of enrollment shall be taken as the day on which members of such tribe arrive at the exact age in years shown by such records, and so making date of enrollment an exact legal equivalent of date of birth.

2. The construction given to Section 3, of the Act of May 27, 1908, by the Circuit Court of Appeals of the Eighth Circuit, in *McDaniel* v. *Holland*, 230 Fed. 945, approved by that court in *Etchen et al.* v. *Cheney et al.*, 235 Fed. 104, and followed by the Supreme Court of Oklahoma in many cases, and followed, also, by state and federal trial courts in Oklahoma, not being patently opposed to the language of the Act, and having become the criterion by which the age of the mem-

bers of the Five Civilized Tribes is ascertained and the validity of deeds, attacked on the ground of minority, is determined, should be regarded as establishing a rule of property in Oklahoma and followed by this court.

3. The Act of May 27, 1908, removing all restrictions on all allotted lands of citizens of the Five Civilized Tribes not of Indian blood, and all citizens by blood of the said tribes of less than half blood, including minors, should not be construed as reimposing restrictions or creating restrictions on such classes not theretofore existing, and, thus, making the Act defeat its declared purpose.

4. That acts are spoken of in statutes and judicial decisions as being void does not necessarily mean such acts are void in the technical meaning of such term, but, more often, means the acts prohibited and declared void are voidable, as acts are rarely, if ever, void in the full technical significance of such term.

5. Conceding that the lease of August 24, 1909, was void and, also, the lease of February 8, 1911, they were susceptible of adoption or ratification, and, in fact, were adopted, ratified and confirmed, and, such being the fact, this cause should be affirmed, although this court may be of the opinion that the construction given the Act of May 27, 1908, by the Supreme Court of Oklahoma is erroneous. And of these, in their order.

I.

Section 3 of the Act of May 27, 1908, (35 Stat. L. 312) declaring the enrollment records of the Commission to the Five Civilized Tribes to be conclusive evidence of the age of Indian and Freedmen members of such tribes, means age as disclosed by such records, and not that the date of enrollment shall be taken as the day on which members of such tribe arrive at the exact age in years shown by such record, and as making date of enrollment an exact legal equivalent of date of birth.

It being conceded that Gilcrease was in fact of age February 8, 1911, and the trial court and the Supreme Court of Oklahoma having found that there was no evidence to support the allegations of actual and implied fraud, these questions are eliminated from consideration, and the case, of necessity, depends upon the fact whether Gilcrease, though of age in fact, was a minor as shown by the enrollment records, and, consequently, a minor within the purview of the Act of May 27, 1908; and the Oklahoma court having determined that there was no evidence in the case showing the date of Gilcrease's enrollment, it seems to us that but two questions can arise under the construction of such act: (a) Whether the enrollment record does disclose the age of Gilcrease within the purview of such act; (b) whether the Act of May 27, 1908, instead of removing restrictions, imposes restrictions, and a citizen of the Five Civilized Tribes cannot sell lands allotted to him until he appears

by the enrollment records to be of age. The first of these propositions will be discussed under this head of our brief, and the remaining one will be left for discussion under subsequent appropriate heads.

It is a general doctrine of the law—and one that, so far as we are advised, is without exception—that, when a deed or other instrument is attacked on the ground of minority, the instrument is presumed to be valid and binding until the fact of minority is established, and the burden of establishing such fact is on the minor or other person attacking the instrument. This general doctrine is well recognized and established in the State of Oklahoma and has been without exception applied to deeds and other instruments executed by citizens of the Five Civilized Tribes when attacked on ground of minority. Of the numerous cases so holding, we cite but two of the more recent cases.

In *Rice* v. *Ruble*, 39 Okla. 51, 134 Pac. 49, the court say:

> "Where a grantor of land seeks to disaffirm her deed and recover the land on the ground that she was a minor when it was executed, she has the burden of proving minority as alleged."

In *Sharshontay* v. *Hicks et al.*, 166 Pac. 881, not yet officially reported, the Supreme Court say:

> "In the case of *Rice* v. *Ruble*, 39 Okla. 51, 134 Pac. 49, the court said: 'Where a grantor

> of land seeks to disaffirm her deed and recover the land on the ground that she was a minor when it was executed, she has the burden of proving minority as alleged.' This principle of law is well established by this court and we cannot say that the court erred in its findings of fact and the judgment rendered thereon."

When we come to consider the Act of May 27, 1908, and construing the same, we must do so in the light of this general doctrine of the law and assume that Congress was familiar with it and passed the Act of May 27th, with such knowledge and with the knowledge that such Act would be construed by the courts in the light of such doctrine.

Coming now to the Act of May 27, 1908, 35 Stat. L. 312, the part of the Act that bears upon the subject under consideration is that portion of Section 3, which is as follows:

> "That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribe and of no other persons to determine questions arising under this Act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

It is at once evident from the most casual perusal of Section 3 that Congress assumed that the approved rolls and the enrollment records of the

Commissioner to the Five Civilized Tribes disclosed the age of members of such tribes and the quantum of blood of the Indian citizens thereof, and further that it is the quantum of blood and the age as disclosed by such rolls and enrollment records of which such records are made conclusive evidence. The Act does not declare that the members of said tribes shall be assumed to be of the age shown by such records on the date of enrollment; such records are made conclusive evidence of age and this of necessity means that the age of such citizens and members as disclosed by such records shall not be open to dispute. It must of necessity further follow, that if such records do not disclose the age and degree of blood of such members or citizens they cannot be conclusive evidence of their age and degree of blood as no record can be made by *legislative declaration evidence of a thing it does not contain* except as it may be evidence of a precedent fact or act.

The question then arises whether the enrollment records introduced by Gilcrease disclose his age. The only evidence introduced by Gilcrease to sustain his contention that he was not of age as shown by the enrollment records was what is known as the roll card found on the lower part of page 92 of the printed record—this is a portion of the rolls of citizenship and of freedmen approved by the Secretary of the Interior and made by Section 3 of the Act of May 27, 1908, conclusive evidence as

to his degree of blood, but in no manner evidences his age, the same roll card is again found about the middle of page 107 of the printed record—and the enrollment record commonly known as the census card marked, "Plfs. Ex. S", inserted between pages 108 and 109 of the printed record and also found in the opinion of the Supreme Court of Oklahoma inserted between pages 112 and 113 of the printed record.

These cards being the entire record evidence offered by Gilcrease to sustain his contention that he was a citizen by blood under the Act of May 27, and that he was not of age as shown by the enrollment record and such enrollment records being made by the Act conclusive evidence of age, it is to such enrollment records so introduced, commonly known as the census card to which we must refer for the ascertainment of his age. Take such enrollment record, scan it from end to end, consider it from any angle we desire and it is respectfully submitted that it is impossible to determine from such census card or enrollment record the exact age of Gilcrease on the 8th day of February, 1911, or at any date subsequent thereto. It is impossible to determine from such record the date of the application for the enrollment of Gilcrease except that it appears from an endorsement on the face thereof that his enrollment was approved by the Secretary of the Interior, 1902, and that a citizenship certificate was issued June 9, 1899, and

consequently he must have been enrolled on or before such date.

It should be borne in mind, however, that this enrollment record is declared by the Act of Congress to be evidence alone of one fact, that of age, but, for the purpose of the argument, assuming the endorsements on the face of the record are competent evidence of the facts appearing in such endorsements, the necessary conclusion must be that the application for enrollment was made prior to June 9th, 1899. For if such endorsements are to be treated as competent evidence of the facts they state, it appears that a citizenship certificate was issued June 9, 1899, but it does not appear to whom such citizenship certificate was issued, but assuming that such citizenship certificate was issued to each of the persons whose names appear on the enrollment record or census card and therefore to Thomas Gilcrease, it appears that the application of Gilcrease for enrollment must have been made prior to June 9, 1899, because, in the nature of things, the application for enrollment must have preceded the issuance of the citizenship certificate, and such are rarely, if ever, issued on the day of enrollment.

If the citizenship certificate must, in the nature of things, have been issued subsequent to the enrollment of Thomas Gilcrease, it follows that such record does not furnish any evidence as to when Gilcrease was enrolled and his age on enrollment. True it is, it appears from such record that Thomas

Gilcrease was nine years of age at some time, but when he was nine years of age does not appear. It also appears from such record that Thomas Gilcrease was admitted by the Colbert Citizenship Commission September 1, 1896. And who can tell from an inspection of such record whether the figure "9," appearing in the column headed "Age," is or is not intended to refer to his age at the time of such admission; or who can tell from an inspection of such record what date Thomas Gilcrease became nine years of age? Again we repeat, and repeat with emphasis, that no one can tell from an inspection of said record, without more, when, on what day, or in what year, Thomas Gilcrease would become 21 years of age.

It is the enrollment records that Congress makes the conclusive evidence of age; that is, the existing enrollment records, *not records aided by assumption and resting on supposition or eked out by judicial presumption.* Congress has made the records conclusive evidence of age on the assumption that such records disclose the fact of which they were made conclusive evidence. If the records fail to disclose the fact of which they are, by congressional declaration, the conclusive evidence, they are not and cannot be evidence of such fact. It is the same as if Congress had passed a law declaring the entries in family bibles should be conclusive evidence of age. If one family possessed no bible, and another possessed a bible but no entries show-

ing the age of particular members of the family, the purpose of Congress in making such bibles conclusive evidence would fail in the particular case, because, as to such fact, the record did not exist; so, as to the enrollment records in regard to a particular case, if such records do not show the age of an Indian—if such records do not furnish the data from which such age can be calculated—the purpose of the Act of Congress, in making such enrollment records conclusive evidence of age as to such particular Indian, fails, and, in order to ascertain the age of a particular Indian in such a case, we must, of necessity, resort to other evidence. And this is the established law in Oklahoma, and was the established law prior to the commencement of this litigation.

In *Jackson et al.* v. *McGilbray*, 46 Okla. 208, the Supreme Court of Oklahoma, speaking of a certified copy of the rolls in connection with the Act of May 27, 1908, say:

> "No date appears in this record itself showing when it was compiled. The age of the allottee, Clarence McGilbray, is unquestionably shown therein to be 9 years at some time not stated. When was he 9 years old? When did he reach his majority? These dates, it is impossible to determine from the record itself."

In *Jackson* v. *Lair*, 48 Okla. 269, the Supreme Court of Oklahoma was passing on an enrollment record under the Act of May 27, 1908, which disclosed that Minnie Landrum would be, according

to the rolls, 18 years old in the year 1908, but did not disclose at what time in that year she reached such age, and upheld deeds made by her in September, 1908, on the ground that the enrollment records did not show her to be a minor, and that the oral evidence did show her to be or was such that the trial court could conclude that she was of age at the date of the execution of the deed; and, in passing on the question, the court say:

> "On the other hand, it is both clear from the language of said Act of May 27, 1908, and well established by the decided cases, that, in respect to the age of the plaintiff at the time she executed the conveyances that were made by her after July 27, 1908, when that act took effect, the said enrollment record was not only admissible but was conclusive as to her age as shown by it. *Gilbert* v. *Brown*, 144 Pac. 359. But that record did not show, nor tend to show, her precise age within the year 1908. It throws no light, whatever, upon the date within that year after which she became 18, and, therefore, capable of conveying. This question, unsettled by the enrollment record, must necessarily be determined by indulging a legal presumption or by resource to other evidence than the record."

The court again says:

> "The oral evidence showing, as the trial court found, that Minnie Landrum was 18 years old at the time she executed to plaintiff the deeds of 1908, plaintiff was clearly entitled to the equitable relief given him."

The rule laid down by the Oklahoma court must be the correct rule. There can be no other rule. To hold otherwise would be to hold that a citizen of the Five Civilized Tribes could not sell until he appeared to be of age by the enrollment records, which is an entirely different thing from holding the enrollment records to be conclusive evidence of age, or that a minor citizen of the tribe *could sell, notwithstanding a prohibition on such sale,* if the enrollment records did not disclose his age, and that oral evidence could not be introduced for the purpose of establishing minority, and, therefore, the invalidity of the deed. Either of such holdings, we submit, would be reading something into the Act of Congress which it does not contain, and would result in shocking our sense of right and justice.

It was contended by petitioner in his application for a rehearing in the Supreme Court of Oklahoma, as it is contended here that the word and figures "June 9/99," in the lower right hand corner of the enrollment record, give the date of application of enrollment of Thomas Gilcrease, and that, consequently, it follows that it should be held that such record shows that Thomas Gilcrease was nine years of age on June 9, 1899—thereby, in effect, making the day of the application of enrollment the legal equivalent to the anniversary of the date of birth of Thomas Gilcrease—and that we should construe the enrollment record as disclosing that

Gilcrease was exactly nine years of age June 9, 1899. It is evident such a conclusion cannot be arrived at from the face of the record itself, and it is only by supposing something that the record does not disclose that such conclusion can be arrived at.

Congress has made the enrollment records as they *exist* the conclusive evidence of age—not some suppositious record—not some record aided and assisted by what this court or someone else might determine should be read into the record, or what the record was supposed to, but does not in fact, disclose. Congress enacted that, on the production of the enrollment records *showing the age, such age should be conclusive,* and the matter of age put at rest thereby. It did not mean, if, in a particular case, the record failed to disclose the age, fictions, construction and supposition should be resorted to to eke out a deficient record for the purpose of giving effect to an Act of Congress or to a purpose Congress intended to declare in such act, but, in fact, did not declare.

The proposition seems to be that the word and figures "June 9/99", in the lower right hand corner of the record, mean that Thomas Gilcrease made application for enrollment on that day. There is nothing on the face of the record to show such to be the fact or tending to show it to be the fact. It is only by indulging in presumption and supposition that it can be determined such is the meaning of the words. It is suggested, however, we

must so hold in order to give effect to the Act of Congress. Why this is so, we are not told. Why, in order to carry out the intention of Congress, we should say such words and figures mean the date of the application for enrollment, and that the mother and her five children were on that day of the exact age shown in the column headed "Age," we are at a loss to determine; and how such holding would effectuate the purpose of Congress, we are at a loss to determine. It seems to us it would be *directly* to the contrary, for Congress has made *existing records conclusive evidence.* We would be making *a suppositious record,* and then saying the record thus made is the record meant by Congress. If the record does not show the age of an Indian, the purpose of the Act of Congress in making such enrollment records conclusive evidence as to such particular Indian, it is true, fails. That does not, however, CALL UPON COURTS TO MANUFACTURE, BY REASONING, A RECORD, and then apply the Act of Congress to the record SO MANUFACTURED.

The Supreme Court of Oklahoma has held, and in our judgment correctly held, that it cannot take judicial knowledge of the meaning of such words and figures, and, unless this court holds it can take judicial knowledge of the meaning of such words and figures, and that such words and figures mean that Thomas Gilcrease made application for enrollment on June 9, 1899, there is no way in which it can arrive at such conclusion, for there is in the

record no evidence explaining such words and figures or showing for what they stand or were intended to stand. But, supposing that the court will take judicial knowledge of the meaning of such words and figures, and that such words and figures mean that Thomas Gilcrease made application for enrollment on June 9, 1899, that does not affect the case, for there is nothing in the Act which makes the date of the application for enrollment evidence of any fact; nor does it declare that the date of the application for enrollment shall be taken as the birthday of a citizen, or that the age as disclosed by the record shall be taken and held to be the exact age of a citizen or member of the tribes on the day of his application for enrollment.

We have said there is no evidence in the record showing or tending to show that June 9, 1899, was the date of the application of Thomas Gilcrease for enrollment, and this is entirely correct. However, it does appear in the printed record, from the certificate of J. G. Wright, Commissioner of the Five Civilized Tribes, certifying the roll card or approved rolls (on pages 921 and 107 of the printed record), that Thomas Gilcrease was enrolled as of June 9, 1899. Such statement is not evidence of such fact. The only purpose of such certificate is to identify the roll offered in evidence to show the degree of blood of Thomas Gilcrease, and is not evidence of any other fact. This clearly appears from the decision of the Supreme Court of Oklahoma in this particular cause, and from the case of

Jackson v. *McGilbray supra*, in which last case the authorities, or a great many of them, bearing on the office of such certificate, are given; indeed the roll card itself is made evidence *alone* of the quantum of blood; but, taking June 9, 1899, as the date of the enrollment of Thomas Gilcrease, and that the endorsement in the lower right hand corner of the census card (appearing between pages 108 and 109 of the printed record, and, again appearing between pages 112 and 113 of such record) should be given the same legal effect as if it read: "Date of Enrollment, June 9/99," how does this help petitioner or tend to show that the Supreme Court of Oklahoma committed error in construing or applying the Act of May 27, 1908? How would this affect such question in any aspect, save that of determining that Gilcrease was nine years of age on such date, and would, consequently, be 21 years of age June 9, 1911? How would it show or tend to show that Gilcrease was not 21 years of age February 8, 1911, unless we construe Section 3 of the Act of May 27, 1908, so as to make it read as follows:

> "That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes, and of no other persons, to determine questions arising under this act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen

or freedman, and the age shown by such records shall be conclusively presumed to be the exact age of such citizen or freedman on the day of his enrollment?"

It is submitted that, to so construe the Act, would be in effect to add to it a provision that Congress did not see fit to enact, and would be merely an arbitrary attempt on the part of the courts at judicial legislation.

It may be that Congress might have more effectively carried out its intention of providing a certain means of ascertaining the age of citizens and members of the Five Civilized Tribes if it had enacted Section 3 in the form above suggested. It is a sufficient answer, however, to this to say that Congress legislated in reference to the age of Indians, and, in reference to the enrollment records showing the age of such citizens and members—and therefore, presumed to be familiar, at least to some extent, with such records—did not so enact, but thought it wiser and better to take the age as in fact shown by such records, and not to establish an arbitrary and immutable method of ascertaining the age of such citizens and members, an arbitrary method that in the majority of cases could not, in the nature of things, be in accord with the fact. If we say that the endorsement in the lower right hand corner of such census card or enrollment record should be read or given the same legal effect as if it read: "Date of application for enroll-

ment," or "Date of enrollment, June 9, 1899," then, in such event, the exact question that would be raised by a record in such state has been passed on adversely to the contention of the petitioner, both by the Circuit Court of Appeals of the Eighth Circuit and the Supreme Court of the State of Oklahoma, prior to the determination of this case, and has been followed in numerous cases, and is now regarded *as the established law in Oklahoma, by a long line of adjudicated cases.*

In *McDaniel* v. *Holland,* 230 Fed. 945, a census card similar in all respects to the census card or enrollment record in evidence in this case was before the court, except that it was the enrollment record or census card showing the enrollment of Robert L. Holland. This census card, like the Gilcrease census card, had on it: "October 11, 1900," and showed that Robert L. Holland was nine years of age. It was also shown that, after the making of the record, the words "Date of application for enrollment" were added to such census card or enrollment record, immediately preceding the word "October," and it was further shown by the evidence in the cause that such date was in fact the date of the application for enrollment. The question before the Circuit Court of Appeals of the Eighth Circuit was whether such record showed Robert L. Holland was a minor on September 25, 1912, and continued to be such minor until October 11, 1912. The Circuit Court of Ap-

peals, after setting out the facts in the case and the census card, say:

> "At the lower right-hand corner of the census card that was introduced in evidence by the plaintiff appear the following words and figures: 'Date of application for enrollment, Oct. 11, 1900.' It was shown by evidence introduced by the defendants that the words 'Date of application for enrollment' were placed upon the card before 'Oct. 11, 1900,' long after the census card had been made out, and that they were placed upon the card so that persons examining the record might know what the word and figures 'Oct. 11, 1900,' meant. It appeared from the evidence that the census card originally simply contained the word and figures, 'Oct. 11, 1900.' There is no question, however, but that the date mentioned was the date of the enrollment. The date of birth of the plaintiff did not appear from any evidence introduced unless the census card showed it. It appeared also from the evidence that the Paraffine Oil Company was in possession of the premises engaged in exploring and mining the same for oil and gas. Counsel for defendants offered evidence which they claim tended to contradict the finding of the Commission to the Five Civilized Tribes as to the age of the plaintiff, Robert Lee Holland. The several offers were denied, but as we view the case it is not necessary to consider the rulings of the court on said offers."

The Circuit Court of Appeals then goes on to discuss the point raised by the defendants, that the

plaintiff had not capacity to maintain the suit, deciding the point adversely to the contention of the defendants. After so doing, it reverts to the claim of the plaintiff, that his deed was void on account of being executed when he was a minor as shown by the enrollment records, and the effect of such record or census card, and, in that connection, says:

> "The right of the plaintiff to recover possession of the land in controversy is based upon the following claim: That the enrollment record shows the age of Robert Lee Holland to have been nine years at the date of enrollment, to-wit: October 11, 1900, and also that this date was his ninth birthday. Hence Holland would not arrive at the age of 21 years until October 11, 1912, therefore, his deed to McDaniel made on the 25th of Septemper of that year is null and void under the act of Congress of May 27, 1908 (35 Stat. 312). The important question therefore is whether the evidence introduced at the trial showed the plaintiff, Robert Lee Holland, to have been less than 21 years of age when he executed and delivered the deed to McDaniel for the land in question, and not whether he was 9 years of age on October 11, the date of his enrollment."

The court then sets out that portion of Section 3 of the Act of May 27, 1908, quoted in this argument, and then proceeds:

> "We may accept the record introduced as conclusive that the plaintiff was nine years of age at the date of the enrollment October 11,

1900; but this does not prove that he was a minor on September 25, 1912, as the finding by the Commission that he was nine years of age on October 11, 1900, is entirely consistent with the fact that he had arrived at the age of 9 years at any time within one year prior to October 11, 1900, for after arriving at the age of nine years he would be 9 until he arrived at the age of 10, which would be a period of one year."

The court then proceeds to show how the basis of the claim of the plaintiff—that he must be considered as exactly nine years of age October 11, 1900, and that such date must be conclusively held to be the anniversary of the ninth birthday of the plaintiff—arose, and sets out certain correspondence of the Interior Department, from which it was claimed that the department so construed the Act of May 27, 1908, and that such construction amounted to a construction of the Act by the department of the government charged with its administration, and, therefore, should be followed by the court. From such correspondence, it appears that, in many cases, the exact age of the members and citizens of the Five Civilized Tribes was not given, but such ages were given in years. It further appears that persons seldom, on being asked their ages, give any age other than their age at the last birthday, and it is further said: *"The rule is so universal, in the opinion of the office, as to justify a holding that in all cases where the age of a minor is given by parents or relatives, the age*

given relates to the last preceding birthday." This statement is made by officers having charge of the enrollment of Indians and familiar with the facts pertaining to such enrollment and the customs and habits of the persons whom they enroll. Therefore, it would appear, where the date of birth is not given, that the age shown on the enrollment records or census cards is not the exact age of the person enrolled on the date of enrollment, but is the age of such person at his last preceding birthday and was so understood and intended by the Commission. For the purposes of administration, the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the Interior Department consider the age shown as the exact age of the Indian on the date of his application for enrollment, and that such date should be held to be the anniversary of the date of birth, except where the record otherwise showed. It further appears that this recommendation of the Commissioner was approved by the Secretary. The Circuit Court of Appeals then proceeds to dispose of the contention that this amounted to a construction of the Act, and, disposing of such contention, say:

> "This recommendation of the Commissioner, approved by the Secretary, is claimed to be a construction of section 3 of the Act of May 27, 1908, (35 Stat. 312) by the department of the government having charge of the enforcement thereof, and as such to be entitled to great weight, but the clause reading, 'and that the

date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise,' was not a construction of the statute, but was a plan adopted by the Land Department, 'for the purposes of the government' in the administration of the duties devolved upon it in connection with Indian lands. It may be conceded to have been a convenient plan for the purposes of the government, and no doubt as between the government and the Indian it was workable, but as against the defendants in this action it was, and is, a pure fiction, not supported by even a probability. If in this case the question was whether or not the plaintiff was nine years of age on October 11, 1900, the judgment of the Commission under the statute would be conclusive, but as we have before indicated that is not the question. The question here is, was the plaintiff a minor on September 25, 1912; that question the enrollment record introduced in evidence did not determine, and of course, is not conclusive. The enrollment record introduced in evidence left the date of birth of the plaintiff an open question to be established by competent evidence."

This ruling of the Circuit Court of Appeals was followed by the same court in *Etchen* v. *Cheney*, 235 Fed. 104, and it says:

"The enrollment record introduced in evidence showed the date of the enrollment of Frank C. Elliott, an Indian, to be October 16, 1900, and his age at that time to be 10 years. On this evidence the trial court found that Elliott became 21 years of age October 16,

1911. The master found when the case was last before him that Elliott was born January 26, 1890, and reached his majority January 26, 1911. The finding of the master must stand, although it makes no material difference in this case which day is taken. We held in *McDaniel and Paraffine Oil Co.* v. *Robert L. Holland* (No. 4461), 230 Fed. 945, — C. C. A. —, that the date of enrollment, standing alone, was not evidence that a particular Indian was born on that day."

In *Heffner et al.* v. *Harmon,* 159 Pac. 650, not yet officially reported, the Supreme Court of Oklahoma say:

"It was incumbent upon the plaintiff below to establish by competent evidence that the allottee, Robert Ross, was a minor at the time he executed the oil and gas lease to Lula M. Heffner, on February 21, 1912. In an effort to do this he introduced the enrollment record of the Commissioner to the Five Civilized Tribes, and according thereto the said Robert Ross, the allottee, was enrolled as of 10 years of age on April 4th, 1901. The lower court held that Robert Ross became of age on April 4, 1912, and that the lease executed by him on February 21, 1912, was void for the reason that he was a minor at the time of its execution. We do not think that the lower court was justified in finding from this evidence here that Robert Ross arrived at his majority on the 4th of April, 1912, and not before."

The court then proceeds to quote from the case

of *McDaniel* v. *Holland*, *supra*, with approval, and then say:

> "In the instant case the age of the allottee on February 21, 1912, was an important question to be determined. The date of the birth of Robert Ross was an open question to be decided by competent evidence. Under the record here, there was no competent evidence from which the trial court could determine that Robert Ross was not of age on February 21, 1912, the day upon which he executed the gas lease to Lula M. Heffner."

In Oklahoma, the head notes of a case, by statutory enactment, constitute the law of the case. And the first head note to the above case is as follows:

> "Under Act May 27, 1908, c. 199, Sec. 3, 35 Stat. 313, providing that the enrollment records of the Commissioner to the Five Civilized Tribes should be conclusive evidence as to the age of an enrolled citizen or freedman, the enrollment record, giving the age of an Indian as 9 years, is conclusive that on that date he had passed his ninth birthday and had not yet reached his tenth, but is not conclusive that he was exactly 9 years of age on that day, and does not establish that he was a minor when he made a conveyance of land one month less than 12 years thereafter."

The second head note is, as follows:

> "A ruling of the Commissioner of the General Land Office that the department should

hold that the age of a citizen of the Five Civilized Tribes as given in the application for enrollment should be construed, for the purposes of the government, as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of the birth, except where the records show otherwise, was not a construction of Act May 27, 1908, c. 199, sec. 3, 35 Stat. 313, providing that the enrollment should be conclusive evidence as to the age of the Indian and entitled to weight as a construction by the department having charge of the enforcement of the act, but was merely an administrative plan, adopted for the purpose of the government, and does not render the enrollment showing the age only by years conclusive as to the date of birth, against a purchaser of land from the Indian."

In *Hart et al.* v. *West et al.*, 161 Pac. 534, not yet officially reported, the same question was again before the Supreme Court of Oklahoma, and it says:

"In the instant case the age of the allottee on December 17, 1900, was ten years, and the enrollment record did not show on what date prior to that time she became ten years of age.

The general rule, as stated by 13 Cyc. 738, is as follows: 'It is presumed that the grantor in a deed was competent to execute the same at the time of its execution, and the burden of proving incompetency is on the person alleging.'

In the case of *Jackson* v. *Lair*, 150 Pac. 162, it is said by Mr. Commissioner (now Justice) Thacker, in construing this statute:

'But that record did not show, nor tend to show, her precise age within the year 1908. It throws no light whatever upon the date, within that year, at which she became 18, and therefore capable of conveying. This question, unsettled by the enrollment record, must necessarily be determined by indulging a legal presumption or by recourse to other evidence than the record'."

The court then quotes from the McDaniel case as follows:

"In the very recent case of *McDaniel* v. *Holland*, 230 Fed. 948, 145 C. C. A. 139, in a case identical in principle with the case at bar, it is said:

'We may accept the record introduced, as conclusive that the plaintiff was nine years of age at the date of the enrollment October 11, 1900; but this does not prove that he was a minor on September 25, 1912, as the finding by the commission that he was nine years of age on October 11, 1900, is entirely consistent with the fact that he had arrived at the age of 9 years at any time within one year prior to October 11, 1900, for after arriving at the age of nine years he would be nine until he arrived at the age of ten, which would be a period of one year.'

Then, after referring to the rule adopted by the General Land Office of holding the application date of the enrollment record as the anniversary of the allottee, that court concludes:

But the clause reading, 'and that the date of the application shall be held to be the anniversary of the date of birth except where the

records show otherwise,' was not a construction of the statute, but was a plan adopted by the Land Department, 'for the purposes of the government,' in the administration of the duties devolved upon it in connection with Indian lands. It may be conceded to have been a convenient plan for the purposes of the government, and no doubt as between the government and the Indian it was workable, but as against the defendants in this action it was, and is, a pure fiction, not supported by even a probability. If in this case the question was whether or not the plaintiff was nine years of age on October 11, 1900, the judgment of the commission under the statute would be conclusive; but, as we have before indicated, that is not the question. The question here is: Was the plaintiff a minor on September 25, 1912? That question the enrollment record introduced in evidence did not determine, and, of course, is not conclusive. The enrollment record introduced in evidence left the date of birth of the plaintiff an open question to be established by competent evidence.'

This court, in the very recent case of *Heffner* v. *Harmon*, 159 Pac. 650 (No. 7547), not yet officially reported, has also held, in a case identical with the case at bar, that the age of the allottee, where the date of birth is not shown by the enrollment record, may be shown by competent evidence."

In *Jordan* v. *Jordan et al.*, 162 Pac. 758, not yet officially reported, the Supreme Court of Oklahoma say:

"The certified copy of the enrollment records in the office of the Commissioner to the

Five Civilized Tribes, introduced in evidence at the trial, showed that John B. Jordan was nine years of age upon the 10th day of November, 1900, without disclosing his exact birthday and with no showing of the time at which he arrived at the age of nine years."

The court then, with the statement that the rule announced had been repeatedly followed by the Supreme Court of Oklahoma, cites and quotes from the case of *McDaniel* v. *Holland*, also citing Oklahoma cases, among which is *Gilcrease* v. *McCullough*, being the same case in which a writ of certiorari has been issued to the Supreme Court of Oklahoma, and then proceeds:

"The above cases lay down the principle that, where the enrollment record of an Indian purports to give his exact age, such record is conclusive, but that such record is not conclusive of facts which do not purport to be shown by it. The enrollment record introduced in evidence in this case did not purport to show the exact age, by day and month, of John B. Jordan, but only purported to show that he was nine years of age on November 10, 1900.

The question at issue was as to whether John B. Jordan was twenty-one years of age upon April 16, 1912; and the showing by the enrollment record that he was nine years of age on November 10, 1900, the record not purporting to show that November 10th was his birthday, would not be proof that he was not twenty-one years of age upon April 16, 1912."

In *Hutchinson* v. *Brown*, 167 Pac. 624, not yet officially reported, the question was again before the Supreme Court of Oklahoma, and the court say:

> "When the deed from the allottee to Miller was proven, it then devolved upon the defendant to prove his contention of infancy of the allottee. This burden was recognized by the pleadings. Is this burden sustained by the proof that the allottee was enrolled as 7 years of age in August, 1898, the enrollment records being conclusive evidence of the age and not showing the exact birthday, there being no other proof tending to identify such birthday? We think not."

In *Tyrell et al.* v. *Shaffer et al.*, 174 Pac. 1074, Supreme Court of Oklahoma, speaking of the Act of May 27, 1908, says:

> "It is urged with great argumentative force that by the terms of this act of Congress it was intended to make the Indian roll conclusive as to date of births. With this contention, however, we do not agree. It is true the enrollment record is conclusive as to all matters contained within it. The roll in this particular case is conclusive that Bessie Tyrell was eight years old on the 27th day of November, 1899, but it is not conclusive as to the date of her birth. The roll is conclusive that she had arrived at the age of eight years at some period of time within one year preceding the 27th day of November, 1899, but it is not conclusive that November 27, 1899, was her birthday. The act was not intended to arbitrarily fix the date of birth and close the door to all proof regardless of the true facts,

unless the date of birth is stated in the enrollment record. The important question to be determined is whether the evidence on the trial showed Bessie Tyrell was not of age at the time she signed the first deed to Peterson, and not whether she was eight years old on the 27th day of November, 1899, and, the plaintiffs alleging that she was a minor at that time, the burden was upon them to prove that fact."

In another place the court says:

"The conclusion reached in this opinion is abundantly supported, not only by the decisions of this court, but by the Circuit Court of Appeals, and is *no longer an open question in this jurisdiction.*" (Italics ours.)

In *Cushing* v. *McWaters et al.*, 175 Pac. 838, not yet officially reported, the Supreme Court of Oklahoma say:

"Sillin McWaters, the mortgagor, was a citizen by blood of the Choctaw Nation of Indians; and the only evidence offered to establish the allegation that she was a minor at the time she executed the mortgage was the enrollment record, which consists of a census card and the memorandum taken at the time the application for enrollment was made. The memorandum is: 'Date of application for enrollment, 8-9-99.' And the census card shows the mortgagor to have been six years old at the time of the enrollment. The trial court took the view that the memorandum on the census card, to-wit, 'Date of application for enrollment, 8-9-99,' established the birthday of the mortgagor as of August 9, 1899, and

inasmuch as her sixth birthday, by this memorandum, fell on August 9, 1899, she was 17 years old August 9, 1910, and consequently could not have been 18 years old on November 1, 1910, the date upon which she executed the mortgage in question. But in assuming that the memorandum on the census card, showing the date application was made for enrollment, fixed the date of the applicant's birth, the court erred; for the memorandum did not give, nor purport to give, the date of the applicant's birth, but only showed that the date upon which application for enrollment was made was August 9, 1899, and the census card further showed that at that time the applicant was 6 years old, or had passed her sixth birthday. But from anything that appears in that record, it could not be said that she was not 6 years and 11 months old at the time she made application for enrollment; for the record is silent as to when she became 6 years old, and only shows that she had passed her sixth birthday and had not yet reached her seventh, on August 9, 1899, the day upon which she was enrolled."

The court then reviews some of the Oklahoma cases on the same subject and says:

"It is true that, where the enrollment record purports to give the exact age of a citizen of the Five Civilized Tribes, such record is conclusive; but it is not conclusive of facts which are not shown by the record. And the enrollment record introduced in evidence in this case does not purport to give the exact age of the mortgagor, but only shows that she was

six and not yet seven years old August 9, 1899, which happened to be the date of her enrollment. And the burden was on the defendants, who alleged incapacity, to prove it; but the record introduced does not sustain the allegation."

In *Jackson et al.* v. *Lair*, 48 Okla. 269, 272, the court says:

"On the other hand, it is both clear from the language of said act of May 27, 1908, and well established by the decided cases that, in respect to the age of plaintiff at the time she executed the conveyances that were made by her after July 27, 1908, when that act took effect, the said enrollment record was not only admissible, but was conclusive as to her age as shown by it. *Gilbert* v. *Brown*, 44 Okla. 194, 144 Pac. 359. But that record did not show, nor tend to show, her precise age within the year 1908. It throws no light whatever upon the date, within that year, at which she became 18, and therefore capable of conveying. This question, unsettled by the enrollment record, must necessarily be determined by indulging a legal presumption or by recourse to other evidence than the record. Section 3 of said act, which is the one to be considered here, 'merely declares that all allottees who appear to be minors, as therein defined, upon the enrollment records, must hereafter be conclusively presumed to be such in all transactions concerning the alienation of their allotted lands' (*Scott* v. *Brakel et al.*, 43 Okla. 655, 143 Pac. 510); and it therefore does not

appear from the proffered and rejected evidence (the enrollment record) that Minnie Landrum was under the disability of minority at the times in 1908 at which she executed to plaintiff the several deeds of that year. The oral evidence showing, as the trial court found, that Minnie Landrum was 18 years old at the time she executed to plaintiff the deeds of 1908, plaintiff was clearly entitled to the equitable relief given him."

We think that the rule announced by the Circuit Court of Appeals of the Eighth Circuit, and subsequently followed by it and the Supreme Court of Oklahoma, is the correct rule, and the only rule that is consonant with justice and does not necessitate the resort to judicial legislation in the guise of construction, and that the reasons given by such courts are unanswerable.

Section 3 of the Act of May 27, 1908, makes the approved rolls of citizenship and of freedmen of the Five Civilized Tribes conclusive evidence as to the quantum of Indian blood of any such citizen or freedman. Now, in the event such approved rolls do not show the quantum of Indian blood, or do not show whether the enrolled citizen or member is or is not of Indian blood, shall we say that it conclusively appears from the record that he is not of Indian blood? The different Indian treaties and acts of Congress, in reference to the Five Civilized Tribes, generally provide that full-blood Indians and Indians of certain specified degrees of

blood cannot sell or dispose of their allotments or inherited lands without the approval of the Secretary of the Interior, the approval of the proper county court, or the removal of restrictions by the Secretary. An enrolled citizen who is an Indian of full blood, but whose quantum of blood is not shown by the enrollment record, makes a deed to his allotment or inherited land. Shall it be said that, because the Act of Congress makes such approved rolls conclusive evidence of the quantum of Indian blood, and, such approved rolls not showing such degree of blood, such full-blood Indian is conclusively presumed not to be of Indian blood, and, therefore, his deed is valid? Let it not be said that such a situation is not likely to arise, for it has in fact arisen more than once.

Section 19 of the Act of April 26, 1906, 34 Stat. L. 137, provides as follows:

> "And for all purposes, the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior."

This provision is, of course, substantially identical with the provision of Section 3, of the Act of May 27, 1908, making the approved rolls conclusive evidence of the quantum of blood. One, Munnah, was a female Creek Indian of the full-blood. She was enrolled as a citizen by adoption of the Seminole Nation, and the enrollment record did not

show that she was of Indian blood, or give or pretend to give the quantum of such blood. She made a deed to her land, and an action was brought by the United States to set aside the deed, and, it appearing that the enrollment record did not show she was of Indian blood, a motion to dismiss the action was sustained. The United States appealed the case, and, in passing on the question, the Circuit Court of Appeals of the Eighth Circuit, in *United States* v. *Stigall*, 226 Fed. 190, say:

> "It is conceded there were twenty persons on the Seminole roll by adoption, but it does not appear whether they were Indians of other tribes or to what race they belonged. What, therefore, does the entry of a name on the roll of Seminoles by blood, of one as a member of the tribe by adoption, indicate as to what race he belonged to? Absolutely nothing. The Dawes Commission, it is true, was a quasi-judicial body, but the entry upon a roll of the Seminoles by blood that a person became a part of the tribe by being adopted was no more an adjudication that he is one of the white race than that he is an Indian. We conclude that the judicial body, the Dawes Commission, never made any adjudication as to whether Munnah was a white woman or an Indian, and the case is reversed and remanded with instruction that the motion to dismiss should have been overruled, and to set aside the court's order to the contrary, and to give the appellee an opportunity to answer."

In *Lula et al.* v. *Powell*, 166 Pac. 1050, not yet

officially reported, the Supreme Court of Oklahoma, passing on the same question decided in the Stigall case, say:

> "Since the rolls of citizens do not determine the question of Indian blood, we think it permissible to do so otherwise."

It is difficult to understand how Section 3 of the Act of May 27, 1908, could be construed to permit the introduction of parole evidence to show the quantum of Indian blood, so as to defeat the execution of a deed, when the quantum of such blood did not appear from the approved rolls, and, at the same time, hold that parole evidence was not admissible to show the true age of an Indian for the purpose of sustaining a deed, when the true or exact age does not appear from the enrollment records. Therefore, we contend that the Circuit Court of Appeals and the Supreme Court of Oklahoma are exactly right and correct in holding that the approved rolls of citizenship and the enrollment records of the Commissioner to the Five Civilized Tribes are conclusive evidence only of the facts of which they are made conclusive, when such facts appear on or from the records; and, when such facts do not appear, such records and approved rolls are not and cannot be evidence of such facts, and that, in such event, it is open to prove the existence of such facts by any competent testimony. To hold otherwise would be to defeat the evident purpose and design of Congress, and

to permit *Indians to convey their lands and make valid conveyances thereof directly in the teeth of express congressional prohibition.*

Again, it is clearly apparent that Congress did not intend the enrollment records to furnish *two diverse methods of establishing age, or to divide allottees into two distinct classes whose ages would be established by different methods,* yet this, it seems to us, must be the result unless our argument be correct. The enrollment records, in some cases, do give the exact age of allottees by giving the day, month and year of birth, while in some instances, like that of the petitioner, the day, month and year of birth are not given. Now, if the records show that an allottee was born February 8, 1890, and would consequently be twenty-one years of age February 8, 1911, and further show that he was enrolled on June 9, 1899, and, in the column headed "age," his age is given as nine years, shall we say such allottee, despite *the direct and specific giving of his exact age,* shall be held to be a *minor until June 9, 1911?* Such a conclusion, it seems to us, is not to be tolerated, yet we must so hold if petitioner's argument is sound, or hold, as to *one* class of allottees, the *date of enrollment is conclusive* of the fact that the allottee is of the exact age shown in the age column on the date of enrollment, and that, as to *another allottee,* the date of enrollment *is not* the date to or from

which to calculate age, and is not conclusive of the exact age of the allottee on such day.

To hold, as petitioner would have us do, that the words and figures "June 9/99" give or were intended by Congress, under the Act of May 27, to give, for the purposes of the Act, the exact age of Thomas Gilcrease, is to resort—using the language of the Circuit Court of Appeals—to "*pure fiction,*" and then take such "*pure fiction,*" *and not the Act of Congress,* as the divining rod to determine the rights of respondents; is to convert "*pure fiction*" into an Ithuriel spear whose touch is to disclose the justice or injustice of respondents' cause. We cannot believe that this court will do so, but do believe that it should and that it will adopt and follow the rule announced by the Circuit Court of Appeals of the Eighth Circuit and the Supreme Court of Oklahoma, consonant as it is with the wording of the Act and supported by reason and authority, as its construction, and the true construction of the Act.

II.

The construction given to Section 3 of the Act of May 27, 1908, by the Circuit Court of Appeals of the Eighth Circuit, in McDaniel v. Holland, 230 Fed. 945, approved by that court in Etchen et al. v. Cheney et al., 235 Fed. 104, and followed by the Supreme Court of Oklahoma in many cases, and followed, also, by state and federal trial courts in Oklahoma, not being patently opposed to the language of the Act, and having become the criterion by which the age of the members of the Five Civilized Tribes is ascertained and the validity of deeds, attacked on the ground of minority, is determined, should be regarded as establishing a rule of property in Oklahoma and followed by this Court.

Oklahoma is a young and rapidly developing state, and as a consequence thereof the ownership of land changes more frequently, and rules of law concerning real estate and the title to it become established sooner and are relied on with greater confidence in Oklahoma, in the same length of time, than perhaps, in any other state in the Union. The laws permitting the sale of Indian lands are of recent origin, and have been changed several times. These laws, as a rule, created estates, gave power to sell and deal with lands, under conditions which had never theretofore existed, and contained provisions, many of which were in conflict, or seeming conflict, with the existing laws of real estate, and for none of which perhaps did the law of real estate nor the established canons of statutory construction

furnish a sure guide for the determination of their meaning and the exact purpose Congress had in view to effect by their provisions. Lawyers, without any precedent to guide them, without any preceding decisions to enlighten them, could only give their individual judgment as to the effect of these statutes. Individual citizens acted largely on their own opinion of these laws in purchasing lands. All persons who had purchased, who owned, or intended to purchase lands, looked forward with great eagerness and interest for the first decisions on such statutes, so as to have the uncertainty as to the validity of titles put at rest, and the establishment of a criterion by which such titles could be acquired in the future with certainty that the same were valid. In the old states, when title to land is once acquired, as a rule, barring death and insolvency, it remained for many years in the same person. In Oklahoma it is rarely the case that land remains in the same ownership for any considerable length of time. Dealing and trafficking in land is perhaps as common an experience to Oklahomans as dealing and trafficking in personal property. In this condition, an opinion by the Supreme Court of Oklahoma, or the Circuit Court of Appeals of the Eighth Circuit, construing the laws relating to the sale or disposition of Indian lands, within a year from its rendition, will have been acted on by more people in actual transactions, and the acquisition of title to real estate will depend on it in

more instances, than would perhaps occur in any other state of the Union in twenty years.

It can be said, we believe, with entire accuracy, that no rule declared by the Supreme Court of Oklahoma or the Circuit Court of Appeals, as the correct construction or interpretation of an act of Congress permitting the sale of land, after being in force for a year, could be changed without striking down some thousand titles, involving a vast amount in value. If it was ever true anywhere, it is certainly true in Oklahoma, that it is better for the law to be certain than theoretically right. All the lands in the Eastern half of the State of Oklahoma are lands of the Five Civilized Tribes, and there could be no sale of any of such lands, except townsite lots, since the passage of the Act of May 27, 1908, which is not affected thereby, and the cases cited under the first head of this brief from the Supreme Court of Oklahoma, show with what frequency the question of how to determine the age of a citizen under the Act of May 27, 1908, comes before the courts. This is especially true when we bear in mind that as a rule only a few of the cases actually brought and tried reach the Supreme Court, and that the number of cases decided are but an imperfect index as to the number of cases on the road to the Supreme Court and already pending there undecided, involving the same question. It is, without question, true that the rule of construction so announced by the Circuit Court of

Appeals of the Eighth Circuit and the Supreme Court of the State of Oklahoma, has been applied in many cases in each of the counties in that portion of Oklahoma that was formerly the territory of the Five Civilized Tribes, and these cases in the aggregate will run into hundreds, and have affected, or will affect, many thousands of the citizens of the State. There is no means of determining the value of the property that has changed hands, and the amount of consideration that has been paid therefor, in reliance on the rule announced by the Circuit Court of Appeals and the Supreme Court of Oklahoma, and which would be stricken down, lost and destroyed if such rule were now changed. It is safe, however, to say that it runs into thousands in dollars, and in numbers would affect hundreds of persons. The people of Oklahoma should not be afflicted with a result so disastrous, unless it can be said that the construction placed on the Act of May 27, 1908, is so *manifestly wrong, so patently erroneous, so unjust, in its working*, that it should not be tolerated.

In reviewing conditions in Oklahoma, and applying the rule of property thereto, this court, in *McDougal* v. *McKay*, 237 U. S. 372, 384, say:

> "And not only would it be improper for us to disregard the effect of the decisions already announced by the Circuit Court of Appeals and the Supreme Court of Oklahoma, which are supported by cogent reasoning, but considering the peculiar and rapidly changing

conditions within that State, especial consideration must be accorded to them. We accordingly accept the doctrine announced therein, and hold: (1) The property must be treated as an ancestral estate which passed in accordance with the applicable provisions of Chapter 49, Mansfield's Digest; (2) As the father, George Franklin Berryhill, was of Creek blood, and the mother not, he took a fee simple title to all the lands in question. If both parents had been of Creek blood and duly enrolled, each would have taken one-half."

In *Reynolds* v. *Fewell*, 236 U. S. 58, 66, speaking of the Oklahoma rule of inheritance by intermarried non-citizens, which had only been in force for a few years, this court say:

"This decision as to the right of intermarried non-citizens to inherit, has been repeatedly followed, and has become a rule of property which, recognizing the importance of security of titles, we should not disturb, unless it is clearly wrong. But, so far from the case being one of manifest error, it is apparent from the review of their provisions that the most that can be said is that the Creek laws are uncertain and ambiguous, and that their proper construction as an original question might be regarded as doubtful. It is true, of course, as urged by the plaintiff in error, that we are not dealing with a statute of the state, the meaning of which is necessarily settled by the state court. But, even where we have an undoubted right to review, we ought not to overturn in a case, at most debatable, a

> local rule of construction which for years have governed transfers of property."

In *Truskett* v. *Closser*, 236 U. S. 223, 229, this court, speaking of the rule announced by the Supreme Court of Oklahoma in the *Jefferson-Winkler* case, say:

> "The construction has become a rule of property in the state, and we should be disposed to accept it as such, even if we had doubts of the construction of the Act of May 27, 1908."

The above authorities are sufficient to illustrate our contention, and to emphasize the necessity of its adoption by this court. It is true that the statute under consideration is not a state statute, and consequently not settled by the construction placed upon it by a state court. It is, however, a statute of local application, affecting property which can by no possibility exist in any other locality. It was passed primarily to affect only lands and persons in Oklahoma, and, except in very rare cases, can only affect such persons. It has been construed in numerous cases by the Supreme Court of Oklahoma, and, so far as inducing confidence in and reliance upon such decisions by the people, such cases have the same effect as if they were in fact construing a state statute. This construction is the same construction placed on the statute by the Circuit Court of Appeals of the Eighth Circuit, in

most instances the only and final court of review of Federal questions arising in the Federal courts in Oklahoma.

Therefore, we say that this court, recognizing the importance of the security of titles, and that such security should not be disturbed except in cases of necessity, should, unless in its opinion the decisions of the Supreme Court of Oklahoma and the Circuit Court of Appeals of the Eighth Circuit are so manifestly in error, are so clearly wrong, that they plainly violate the *language and evident purpose and intent of Congress*, recognize the doctrine therein declared as a rule of property, and as such follow it, even though such doctrine is different from that which would have been announced by this court in the first instance. We do not believe that a better subject for the application of the doctrine, a more just occasion for its enforcement can arise, than is presented by existing conditions in Oklahoma.

III.

The Act of May 27, 1908, removing all restrictions on all allotted lands of citizens of the Five Civilized Tribes not of Indian blood, and all citizens by blood of the said tribes of less than half blood, including minors, should not be construed as reimposing restrictions or creating restrictions on such classes not theretofore existing, and thus making the Act defeat its declared purpose.

The Cherokee and Seminole Agreements and the Supplemental Choctaw-Chickasaw Agreement in no manner placed a restriction on the minor members or citizens of such tribes than was placed on the adult members or citizens of such tribes. No restriction against the alienation of the lands belonging to the minor members or citizens of such tribes was grounded upon or professed to be grounded upon the fact of minority. Adult and minor members of each of said tribes were placed under the same general restrictions, and, so far as the minor members or citizens of such tribes were concerned, their incapacity to deal with their lands solely on account of minority must be found out of such treaties or agreements.

The Original Creek Agreement, after providing for the selection by guardians, etc., of allotments for minor members or citizens of the Creek Indians, provided generally that the land so selected should not be sold during minority. This, doubtless, constituted a restriction as to sale, depending

entirely upon the fact of minority. The Act of April 26, 1906, in certain instances, removed then existing restrictions—the removal including, under certain conditions, minors; so, at the time of the passage of the Act of May 27, 1908, the only restriction against a minor member or citizen of any one of the Five Civilized Tribes, resting on minority alone, is to be found in the section of the Original Creek Agreement above mentioned, and in Section 22, of the Act of April 26, 1906, (34 Stat. L. 137), which, so far as is pertinent to the discussion under this head, is as follows:

> "That the adult heir of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent and, if there be both adult and minor heirs of such decedent, then such minor heirs may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory."

The section then goes on to provide that conveyances of full-blood heirs should be subject to the approval of the Secretary of the Interior. This section of the Act of April 26, 1906, gives to the heirs of a deceased Indian a right to sell inherited lands which he did not possess—at least in a great majority of cases—prior to its passage, conferring

such right both upon the adult and minor heirs, and, for the safety of minor heirs, provided such sale should be made by duly appointed guardian, and, for the security of full-blood Indians, made the sale subject to the approval of the Secretary of the Interior. This section, it will be observed, only applies to the case of inherited lands, and does not either increase or decrease, or otherwise affect, the restrictions theretofore existing on primary allotments to individual allottees. The effect of such section is to make death remove all restrictions upon the sale of lands allotted to a deceased Indian, and to make the land the unrestricted subject of barter and sale, except that minors could only sell and dispose of their lands by joining in a sale with adult heirs by a duly appointed guardian, and that sales by full-blood heirs should be subject to the approval of the Secretary of the Interior.

Thus, at the time of the passage of the Act of May 27, 1908, there was no restriction based on minority existing as to the lands of four of the Five Civilized Tribes, and, as to such four tribes, so far as their own allotments were concerned, minor members of the tribe had the same right to sell and convey their lands as adult members of such tribes had, and sales by the members of such tribes, so far as such sale would be affected by minority, would not be controlled by the treaties or agreements but would depend upon the same general principles and be governed by the same

general doctrines of the law applicable to all minors, without regard to the status of being an Indian or a member of an Indian tribe, and that, as to minor members of the Creek Tribe, minor members of tribe would have the same right to deal with their allotments as adult members of such tribes would have, subject to the fact that the same could not be sold during minority. This being so, it necessarily follows that, at the time of the passage of the Act of May 27, 1908, the only restrictions based on minority, that could in the nature of things be removed by that Act, would be the existing restrictions on original allotments created by the treaties or agreements applicable alike to adult and minor members of the tribes, the restriction based on minority found in the Original Creek Agreement, and the restriction created by the Act of April 26, 1906, which prevented minor heirs selling inherited lands except by joining in a sale by adult heirs, and section 20 of Act prescribing method of leasing; and, unless it was the purpose of the Act of May 27 to remove such existing restrictions on the lands of minor members of the Five Civilized Tribes, the express provision that the removal includes minors is meaningless, is without force and effect, and accomplishes no purpose. Therefore, we assume it will not be contended that the Act of May 27th did not have such effect, but that it imposed a restriction where none theretofore existed. In order to determine if such was the effect of the Act, it

will be necessary to set out and review some of its provisions. Gilcrease, being only a one-eighth degree of blood, it will be only necessary to set out that portion of Section 1 of the Act dealing with citizens of less than half blood. That portion of Section 1 is as follows:

> "That, from and after sixty days from the date of this Act, the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or encumbrance, be as follows: All lands, including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than half Indian blood, including minors, shall be free from all restrictions * * * The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

Here, we have *a plain and explicit declaration that all lands* of allottees of the class to which Gilcrease belongs are *free from restrictions, including those owned by minors*, and, to emphasize and make clear the legislative intent to declare such lands free from all restrictions, the Act provided that it should not be "construed to impose restrictions removed from land by or under any law prior to the passage of this Act."

Speaking of this Act, the Circuit Court of Ap-

peals, of the Eighth Circuit, in *Bartlett* v. *United States*, 203 Fed. 410, say:

> "It was not the intent * * * to reimpose a restriction upon the alienation of land against which none at the time existed."

And this court, in *United States* v. *Bartlett*, 235 U. S. 72, speaking of such provision of the Act of May 27th, and the effect of the word "removed," say that it was "employed in this legislation in a broad sense, plainly including a termination of the restrictions through the expiration of the prescribed period;" and, therefore, held that, where the term of restriction imposed had expired, such restriction had been removed "by or under law," and so was not reimposed by the Act of May 27th.

Now, in regard to many minor members of the Cherokee, Seminole, Choctaw and Chickasaw Tribes of *less than full blood, all restrictions imposed by the treaties had expired by the expiration of the time limit* fixed in such treaties for the existence of the restriction, and their allotted lands were free from restrictions and were the subject of unfettered commerce so far as any law of the United States was concerned, and to hold that, as to such members, the Act of May 27th imposes a restriction is to create and read into the Act a restriction not therein contained, and to make it do that which it declares it is not its purpose to do—*impose a restriction where none at the time existed—thus making the Act, as to such Indians, an Act imposing*

and not removing restrictions. To so construe the Act is to construe it in favor of imposing restrictions, is to construe it as exaggerating existing restrictions, and is to omit entirely from consideration the declared purpose of the Act and the plain meaning and effect of the words used, is to disregard the decision of this court in the case just cited. It is a well recognized rule of construction that restraints on alienation of land are strictly construed and will not be increased beyond the plain terms creating it, except where necessary to carry out and effectuate the purposes of the instrument containing the restriction. It is another well recognized rule of construction that an Act of Congress will not be construed as at the same time giving and taking away a right. Thus, in *United States* v. *Paine Lumber Co.*, 206 U. S. 467, 51 L. Ed. 1139, this court refused to extend the restriction on the sale of Indian lands to the timber growing on the land, saying:

> "The restraint upon alienation must not be exaggerated. It does not of itself debase the right below fee simple. The title is held by the United States, it is true, but it is held 'in trust' for the individuals and their heirs to whom the same were allotted. The considerations therefore, which determined the decision in *United States* v. *Cook*, do not exist. The land is not the land of the United States, and the timber, when cut, did not become the property of the United States, and we cannot extend the restraint upon the alienation of the

> land to a restraint upon the sale of the timber consistently, with a proper and beneficial use of the land by the Indians, a use which can, in no way, affect any interest of the United States."

In *McLean* v. *United States*, 226 U. S. 374, this court, in passing upon an Act of Congress providing for the payment to Major McLean of all pay, emoluments, etc., to which he would have been entitled had he remained in the army, in answer to the contention that a proper construction of the Act did not entitle him to all such pay and emoluments, but certain deductions should be made therefrom, say:

> "An Act of Congress will not be construed as giving a right and taking it away at one and the same time, nor will the conditions making it necessary be made a reason for defeating it. The word 'all' excludes the idea of limitation."

Speaking of the word "all," the highest court of the State of Virginia, in *Moore* v. *F. & N. Insurance Co.*, 28 Grat. 508, say: "A more comprehensive word cannot be found in the English language." So Congress, to effect its purpose of removing restrictions on the lands of minors of the class to which Gilcrease belongs, used a word than which *"a more comprehensive"* one *"cannot be found in the English language,"* and a word which this court has determined excludes the *"idea of*

limitation." So we are safe in saying that, if all restrictions on lands belonging to minors of Gilcrease's class were not removed, it must be that the general language used in Section 1 is modified by other sections of the Act of May 27th, or that, if all restrictions are removed by such Act, and then reimposed, such imposition must be found in subsequent sections of the Act. Then let us see if there are subsequent sections of the Act which have such effect, or which can reasonably be said to impose such restriction.

Section 1 of the Act of May 27th clearly divides lands belonging to Indians of the Five Civilized Tribes into two classes—restricted and unrestricted lands. Section 2 of the Act then provides:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed, may be leased by the allottee, if an adult, or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided* further, that the jurisdiction of the probate courts of the

State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Section 3 of the Act, insofar as it can have any bearing on the subject under discussion, is as follows:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

Section 6 of the Act, insofar as, in our judgment, it affects the question, is as follows:

"That the persons and property of all minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma * * * Provided that no restricted lands of living minors shall be sold or encumbered except by leases authorized by law, by order of the court, or otherwise."

These three sections are the sections usually relied upon to sustain the argument that the gen-

limitation." So we are safe in saying that, if all restrictions on lands belonging to minors of Gilcrease's class were not removed, it must be that the general language used in Section 1 is modified by other sections of the Act of May 27th, or that, if all restrictions are removed by such Act, and then reimposed, such imposition must be found in subsequent sections of the Act. Then let us see if there are subsequent sections of the Act which have such effect, or which can reasonably be said to impose such restriction.

Section 1 of the Act of May 27th clearly divides lands belonging to Indians of the Five Civilized Tribes into two classes—restricted and unrestricted lands. Section 2 of the Act then provides:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed, may be leased by the allottee, if an adult, or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided* further, that the jurisdiction of the probate courts of the

State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Section 3 of the Act, insofar as it can have any bearing on the subject under discussion, is as follows:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

Section 6 of the Act, insofar as, in our judgment, it affects the question, is as follows:

"That the persons and property of all minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma * * * Provided that no restricted lands of living minors shall be sold or encumbered except by leases authorized by law, by order of the court, or otherwise."

These three sections are the sections usually relied upon to sustain the argument that the gen-

eral scope of Section 1 is limited or the act reimposes a restriction on the lands of minors. We confess we do not understand the argument, nor appreciate the reasoning on which it is based. Section 1, after declaring the status of lands in reference to restriction, and thereby creating two classes of lands—restricted land and unrestricted land—contains no word of limitation on the general removal of restrictions. The effect of this section, standing alone, would, beyond preadventure of controversy, be that minors of less than half blood would, in reference to their Indian lands, be in the same condition as if they were not Indians or, being Indians, there had never been a restriction placed by Congress on their lands; namely, they would occupy the same position as any white child would in reference to land owned by it.

Is this effect changed by Section 2? Undoubtedly, Section 2—at least down to the second proviso—is dealing entirely with the second class of lands whose status has been declared in Section 1; namely, restricted lands. Such section prescribes: (a) How restricted lands other than homesteads may be leased by adult and minor allottees, and the term for which they can be leased; (b) for the leasing of restricted lands for oil, gas or other mining purposes; (c) leases of restricted homesteads for more than one year. Under such section, adult heirs may lease all lands other than homesteads, except for mineral purposes, for a period not to

exceed five years, but without the privilege of renewal. Minor allottees can make like leases by guardian or curator under the order of the proper probate court. Leases for mining purposes, leases of homesteads for more than one year, and all leases for a period of more than five years, under such section, may be made with the approval of the Secretary of the Interior under rules and regulations to be provided by him, and not otherwise. The section, having provided for leasing by guardians and curators, then provides that the probate courts shall have jurisdiction over the lands of minors and incompetents, subject to the foregoing provisions; and declares that the term "minor" or "minors" includes all males under 21 years of age and all females under the age of 18 years.

If we eliminate the second proviso from this section, there cannot be any question but that Section 2 deals entirely with, and is intended to deal alone with, restricted lands. Is its meaning affected by, or its scope enlarged by, the second proviso? We think not. We think the addition to the section made by the second proviso can be accounted for by other reasons than an intention on the part of Congress to enlarge the meaning and effect of Section 2 or modify or restrict the meaning of Section 1. The second proviso is, it seems to us, intended by Congress to apply solely to restricted lands. This is plain from the fact that the body of Section 2 is dealing alone with restricted lands and the first

proviso to such section is dealing solely with restricted lands.

The body of Section 2 immediately preceding the first proviso gives guardians of minors and incompetents full power and authority to lease all restricted lands of their wards except homesteads, for a period of five years, without the privilege of renewal. This, without more, would include the power to execute oil and gas mining leases on such lands with the approval of the probate court. The office of the first proviso limits this general grant of power and provides that oil and gas mining leases and the other leases mentioned in the first proviso can only be made with the approval of the Secretary of the Interior or subject to such rules and regulations as he may provide, and not otherwise; thus, so far as the body of Section 2 and the first proviso are concerned, it is evident that Section 2 is dealing alone with restricted lands. What then in the *second proviso discloses a different intention on the part of Congress?*

The second proviso is not a grant of jurisdiction to the probate courts over restricted lands or unrestricted lands of Indians, it is but a recognition of an existing jurisdiction over the restricted and unrestricted lands of Indian minors and incompetents. Prior to the passage of the Act of May 27, it had been held that under Section 20 of the Act of April 26, 1906, which section, without the second proviso, is in substantial accord with Sec-

tion 2 of the Act of May 27, that probate courts had exclusive power to approve oil and gas mining leases made by guardians of minors and incompetents, and that such leases did not depend for validity upon the approval of the Secretary of the Interior, and did not have to be submitted to him for approval. Congress, remembering that Section 20 of the Act of April 26, 1906, giving the Secretary of the Interior jurisdiction over the leasing of restricted Indian lands and providing that leases of the lands of minors and incompetents could be made under order of the proper court and that such proviso had been construed to remove the lands of minors and incompetents from the jurisdiction of the Secretary of the Interior as to mining leases and fearing that Section 2 of the Act of May 27th and the first proviso thereto might be given the same construction by the courts, in order to prevent such a construction, limits the existing jurisdiction of probate courts by the second proviso by recognizing the existence of the jurisdiction and then providing that such jurisdiction shall be "subject to the foregoing provisions," and then goes on to define the meaning of the term, minors.

The jurisdiction of the probate courts limited by Section 2 must be jurisdiction over restricted lands because such lands and the manner of dealing with them, are the subjects of which such section is treating and for the further fact that the words, "subject to the foregoing provisions," re-

fer to provisions which affect restricted lands alone.

When Section 1 removed restrictions from the lands of designated classes of Indians, such lands immediately became subject to the jurisdiction of the probate courts of Oklahoma to the same extent as if they had never been restricted, and the context of the Act shows that such lands were considered as removed from the jurisdiction of the Secretary of the Interior. Restricted lands of Indian minors and incompetents, being subject to the jurisdiction of the Secretary of the Interior, and likewise being subject to the jurisdiction of the probate courts of Oklahoma, this dual jurisdiction, if undefined, would in all probability be the occasion of frequent conflict. *This conflict, Congress sought to eliminate by making plain and explicit the extent and limit of the jurisdiction of the Secretary of the Interior* and to provide wherein the jurisdiction of the Secretary should be *paramount* and wherein the jurisdiction of the probate courts of Oklahoma should be *subordinate,* and in order to carry out its purpose and design, enacted the second proviso, and it is submitted that the second proviso accomplishes this purpose, and when so considered does not in any manner appear ambiguous nor have the effect to enlarge the scope of Section 2 so as to make it modify Section 1, or to embrace unrestricted lands. Under the section as a whole, all leases of restricted lands other than

homesteads and mining leases made by guardians of minors or incompetents, where such leases do not exceed five years and do not contain a privilege of renewal, the jurisdiction of the probate courts is *paramount* to that of the Secretary of the Interior, and such leases do not have to be submitted to him for approval. *As to all other leases, the jurisdiction of the Secretary is paramount.*

The power of the United States over restricted Indian lands being supreme, and its department of the Interior and the agents of such department exercising powers of guardianship and control over restricted lands and such control having generally been held to be superior to that of the probate courts, Congress intended by the second proviso to remove any doubt as to such *jurisdiction being supreme,* except in the instances in which *exclusive jurisdiction was conferred on the probate courts* and having conferred jurisdiction on the probate courts of the State of Oklahoma over the lands of Indian minors and incompetents and the probate courts of Oklahoma having jurisdiction under certain conditions to sell and dispose of the estates of minors, Congress, still dealing with and having in mind lands which were restricted, provided that such jurisdiction should be limited by the foregoing provisions of the section.

This declaration was inserted in the act, evidently for the purpose of preventing the argument being made that as the probate courts of Oklahoma,

under certain conditions, had the power to sell lands and to make leases for unlimited terms, such courts would have power under such statutory conditions to *lease and sell restricted Indian lands despite the prohibition contained in Section 1 and in "the foregoing provisions" of Section 2*, and therefore, in order to avoid any conflict of authority, *to forestall any such argument*, Congress, by the second proviso, declared the jurisdiction of the probate courts should be *subject to the foregoing provisions*, that is, notwithstanding the general constitutional and statutory provisions giving control to the probate courts of Oklahoma over the estates of minors and incompetents, such general jurisdiction should not extend to the restricted lands of Indian minors and incompetents, but such general jurisdiction should be limited by the preceding provisions of Section 2, viz: that notwithstanding such general constitutional and statutory power, the probate courts of Oklahoma as to restricted lands of minors, could only approve a lease of the surplus lands for a term not exceeding five years, without privilege of renewal, that notwithstanding such general jurisdiction, such courts could not (a) make a lease of restricted homesteads for more than one year, (b) could not sell the lands of such minors, (c) could not make a lease on the surplus lands for more than five years, (d) could not make a mineral lease on such land, but that all such leases could only be made with the approval of the Secre-

tary of the Interior and under the rules and regulations prescribed by him, and not otherwise.

It is evident that Section 3 can in no manner affect the meaning of Section 2 because it only prescribes the method by which the minority of the members of the tribe is to be determind and makes the evidence of such minority therein prescribed conclusive of the fact, so the language of Section 1 and Section 2 can neither be enlarged, limited or otherwise controlled by Section 3, so taking Sections 2 and 3 together, it cannot be successfully contended that they constitute a *limitation on the general release of all lands of all allottees of less than one-half blood, from all restrictions.*

To say that Section 2, by reason of the second proviso, does constitute such a *limitation*, is to place it in opposition to the purpose of Congress as *exactly and plainly declared in Section 1*, and is to say that, notwithstanding the general and unlimited freedom of such lands declared in Section 1, neither the minor, his guardian or curator, nor the minor, his guardian, curator or the probate court together, can make a lease on his homestead for more than one year, that not one, nor all of them together, can make an oil and gas mining lease on any part of his land nor a lease of any kind for more than five years unless such lease be submitted to the Secretary of the Interior for approval. Such a result, it seems to us, cannot be tolerated for a moment, nor can the language of

such section be tortured into any such meaning or as having any such effect.

That such would be the effect of the second proviso, if it is to be held to apply to restricted and unrestricted lands, is at once evident from its perusal and to make this plain, we again quote the second proviso which is, "and provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors as used in this Act shall include all males under 21 years and all females under the age of 18 years."

It appears too plain for argument that unless the limitation placed on the jurisdiction of the probate courts of Oklahoma applies, and was intended to apply only to restricted lands as opposed to lands from which restrictions had been removed or on which restrictions did not at the time of the passage of the Act exist, then the limitation, "subject to the foregoing provisions," limits the jurisdiction of such courts, *both as to restricted and unrestricted lands, and places both classes of lands under identical restrictions*, and consequently the probate courts, the minor and his guardian, acting separately or together, cannot make a lease on his surplus lands for more than five years, cannot make a lease on the homestead lands for more than one year, and cannot make a mining lease on any of the lands, but, for any such of the last named in-

struments to be valid, they must be approved by the Secretary of the Interior because the only things to which the words "subject to the foregoing provisions" can limit the jurisdiction of the court are the things just set out.

It cannot be, it seems to us, that said Section 6 constitutes a limitation on the freedom from restriction granted by Section 1, either by itself or in conjunction with Section 2. To quote from such section again, the material parts affecting the subject under discussion are as follows:

> "That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma * * * provided that no restricted lands of living minors shall be sold or encumbered except by leases authorized by law, by order of the court, or otherwise."

This is a direct grant of jurisdiction to the probate courts of Oklahoma over the persons and property of all minor allottees of the Five Civilized Tribes. This general grant of jurisdiction is followed by the limitation "'except as otherwise specifically provided by law." This includes not only all the provisions in the act preceding Section 6, but all provisions succeeding Section 6 and all provisions in any other laws of the United States. Such limitations on the jurisdiction would have been read into the section in event the section had

failed to set them out, *for a general grant of jurisdiction would not be allowed to repeal special provisions in conflict therewith unless the intention to repeal was manifest.*

The general grant of jurisdiction over the persons and estates of minor allottees followed by the exception noted is equivalent in law to granting general jurisdiction and then excepting from the general grant the specific things that the probate courts are prohibited from doing, thus making the section in legal effect the same as if it granted general jurisdiction and then provided that notwithstanding the grant of such general jurisdiction, the probate courts could not in reference to *restricted lands of Indian minors* do any of the things prohibited by Section 1, Section 2, Section 5, Section 6 or any other section of the Act of May 27th, or any other Act of Congress.

It is difficult to see, to us it is impossible to see, how the words of limitation on the jurisdiction of the power of probate courts contained in either or both of such sections constitute a restriction on the alienation of lands from which all such restrictions have been removed, unless we assume that the mere fact of conferring jurisdiction on probate courts over the persons and estates of minors be sufficient in and of itself to constitute such a restriction and in and of itself sufficient to declare such to be the Congressional purpose.

The general grant of jurisdiction as has al-

ready been stated would be subject to the exceptions created by law.

The laws of Oklahoma specifically confer jurisdiction on the probate courts over the persons and estates of minors and it is believed that the laws of all states confer like jurisdiction on probate courts, or some court having probate jurisdiction. This jurisdiction is in the nature of things general except where it is otherwise specifically provided by law and conditions and exceptions to the jurisdiction of probate courts are contained in nearly all laws. Can it be said with any degree of reason that the general grant of jurisdiction on probate courts over the persons and estates of minors found in all states constitutes a restriction on the alienation of the estates of such minors? Jurisdiction is conferred by all states on probate courts or courts of like jurisdiction over the persons and estates of minors. The exercise of this jurisdiction is generally made to depend on certain precedent steps, yet, the grant of such jurisdiction and the providing that such jurisdiction as to the alienation of such lands depend upon the existence of certain facts has never yet been held to constitute a restriction on alienation and despite such grants, the minor has generally been held to be capable of conveying his land in fee and that a conveyance in fee by a minor is valid and binding, subject alone to his power to avoid the conveyance on his arriving at age, unless he is permitted by statute, as is the

case in Oklahoma, to avoid the sale before arriving at majority. If this be true, and it undoubtedly is, how can we construe, by what process of reasoning can we hold the grant of jurisdiction contained in Section 6 "except as otherwise specifically provided by law" to be a restriction on alienation.

The words in Section 6 "except as otherwise specifically provided by law" primarily refer to the express limitations contained in Section 2, the limitation on the sale of land contained in Section 5 and the limitation contained in the proviso in Section 6, that *restricted lands of no living minor* shall be sold or incumbered except by lease authorized by law, by order of the court, or otherwise.

Unless Section 6 in connection with the other sections above noted, reimpose a restriction or modify the removal of restrictions, there is nothing in the Act of May 27th which reimposes a restriction or in any wise modifies the removal of restrictions for Section 1 of the Act expressly removes restrictions from certain designated classes of lands and then proceeds to deal with lands from which restrictions have not been removed and provides for the removal of such restrictions.

Section 2 is dealing alone with restricted lands; Section 5, in express terms, deals with restricted lands and declares that an attempted alienation or incumbrance of such lands by any method or instrument which affects title thereto prior to the removal of restrictions shall be void. In Section 5,

the inability to sell is by the express words of the section applied to lands from which *restrictions have not been removed* and the prohibition contained in the proviso of Section 6 is *against the sale of restricted lands.*

The restriction against sale in Section 6 is confined by the express words of the proviso, to "restricted lands of living minors"; the restriction being confined to lands of living minors doubtless because death removed restrictions except as to the heirs of full blood and in such last case, retained only a qualified restriction against alienation, viz: that a conveyance made by such heir should be approved by the court having jurisdiction of the settlement of the estate of a deceased allottee.

If it be asked why the proviso was placed in Section 6 and why an exception was made by Section 6 to the general jurisdiction of probate courts, it can only be answered that Congress intended to make plain that by granting to probate courts of Oklahoma power and jurisdiction over the estate of minor allottees, it did not intend that such power should extend to or that it could be fairly argued that such power did extend to *restricted* Indian lands so as to authorize such courts to sell such restricted lands, or to lease such restricted lands except as provided in the Act, and that as Section 5 did not expressly prohibit the sale of restricted lands of minors by the probate courts, that the general grant of jurisdiction conferred on pro-

bate courts the same power to sell lands belonging to restricted Indian minors that it would have to sell the lands of its white citizens, and the restriction contained in the proviso to Section 6 was inserted for the purpose of preventing a possible conflict between such sections and Section 9.

The grant of jurisdiction in Section 6 coupled with the limitation on its exercise and followed by the restriction in the proviso illustrates and emphasizes the intention of Congress to grant only a limited jurisdiction over *restricted lands* and evinces anxiety on the part of Congress that this intention should not be evaded, but evidences no intention to reimpose restrictions removed by Section 1, nor to in any way limit, confine or abridge the general jurisdiction of probate courts over the persons and estates of Indian minors whose lands were *free from Congressional restriction.* This, indeed, it cannot be held to have done, unless we shut our eyes to the provision in Section 1 of the Act that it is not the intention of Congress to impose restrictions on land from which such restrictions have been removed.

A contrary conclusion would accomplish that which Congress has declared it had no intention to do, as a large number, perhaps a majority of the Indian minors of the Five Civilized Tribes belonging to the classes designated in Section 1 from whose lands restrictions are thereby removed, such

restrictions had *already expired by operation of law prior to the passage of the Act.*

Again, it seems clear that there are two general classes of lands treated of in the Act, unrestricted lands and restricted lands, and that as to restricted lands, it is specifically provided the probate courts will have no power to lease or sell, except in the particular instances where such power is expressly conferred by law. Now it follows, that if the Act, after removing restrictions on the lands of certain designated classes of minors, reimposes such restrictions for and during the time of minority that the lands of all *minors, at least during minority,* are restricted lands and as such are subject to the jurisdiction of the Secretary of the Interior, and can be leased only in the manner prescribed in Section 2 and can be sold only after death has removed restrictions as provided in Section 9. Such a result is manifestly not what Congress intended and is directly in the teeth of some of the express provisions of the Act and consequently such a conclusion should not be reached unless we are driven to it by language so plain that its meaning cannot be misunderstood.

The prohibition against alienation, except by lease made by order of court, contained in the proviso to Section 6 confined as it is by express words to restricted lands of living minors, *constitutes by plain and direct implication, constitutes by well recognized canons of construction permission* to

otherwise lease and sell unrestricted lands of living minors to the same extent as if such permission had been explicitly given in plain words.

The argument here made, that the Act of May 27th, does not impose a restriction on lands from which the restriction has been removed by Section 1, is not opposed to any decided case in Oklahoma. It is true, starting with *Jefferson* v. *Winkler*, the Supreme Court of Oklahoma has said that, considering Section 2 and Section 6 of the Act with Sections 5 and 3, Section 1 of the Act removed restrictions as to minors of certain designated classes, and that the other sections reimposed a restriction forbidding alienation except through the agency of the county courts. Such question was not, however, before the court in any case that had arisen prior to the case at bar, the sole question in any of the prior cases being whether the Act of the Legislature of Oklahoma conferred on minors who were married the right to dispose of their property as if of age; whether the removal of disabilities by a decree of court, under the Oklahoma statute, conferred the rights of majority and invested the Indian with the right to sell land as if he were not a minor under the Act of May 27th; or the cases involved the right of an Indian to set aside a deed after becoming of age when there was no question of ratification or adoption after he became of age, or they involved the statute of Oklahoma forbidding a minor over 18 years of age to

bring an action setting aside a conveyance made during minority without return of consideration received therefor. The right in each class of cases was denied, and correctly denied, though, in our opinion, the reasoning on which the denial was based was and is unsound. There are many of these cases, and it will serve no good purpose to quote from or analyze all of them, so we will only review a few of the earlier cases which lay down the doctrine, as examples of the class, and will then review the leading federal cases involving the same question, point out what in our judgment is the difference between the federal and state decisions, and then review some of the recent Oklahoma cases which, in our judgmnt, sustain the doctrine of the federal cases.

In *Jefferson* v. *Winkler*, 26 Okla. 653, 110 Pac. 755, the Supreme Court of Oklahoma was entirely correct in holding that Section 1 of the Act of May 27th removed restrictions on the lands of minors belonging to the designated classes therein, but the question whether the Act reimposed a restriction was neither before the court, nor was it necessary to be decided in order to arrive at the result reached; the sole question in that case and the sole question in all cases prior to the case at bar, arising under the Act of May 27th, being whether a state law, by its own force, could confer on an Indian minor, during the period of minority prescribed by Congress, the powers and privileges of

majority, or authorize a court of the State of Oklahoma so to do, or affect the disabilities of minority imposed by federal law during the prescribed period.

Rebecca Johnson, the allottee, belonged to a class from whose lands restrictions were removed by Section 1, and, during her minority, married. After her marriage, and while still a minor, she made a deed of her lands. Her guardian made application to sell her lands. The order of sale was granted. An injunction was sought to prevent the sale, on the ground that the deed made by Rebecca Johnson was valid to the same extent as if by an adult, and the sale would be a cloud on the title conveyed by such deed. After disposing of questions of practice, the court proceeds to consider the Act of May 27th, and after setting out portions of the Act and the contention of the parties in reference thereto, the court, speaking of Section 1, say:

> "The restrictions with which this section of the Act deals include restrictions upon all allotted lands of members of the Five Civilized Tribes of Indians having less than half blood. The restrictions referred to throughout this section are those restrictions upon the power of the allottee to alienate his allotted lands which are imposed by the provisions of the federal acts and treaties under which the distributive share of such tribal lands of each of the Five Civilized Tribes has been, or is to be, allotted to the respective members of said

tribes. Such restrictions of the first and second class named above are removed as to both adults and minor allottees. The restrictions upon the third class are continued as to both adult and minor heirs until 1931, unless sooner removed by the Secretary of the Interior. In other words, the effect of this Act upon lands of allottees of the different tribes is to divide them, with respect to the restrictions upon the alienation, into two classes: First, those upon which the restrictions are removed, and, second, those upon which the restrictions are continued until 1931. Rebecca Johnson is an allottee of the first class provided for in said section, and after the Act became effective, the restrictions upon her power to alienate allotted lands were removed without any limitations or conditions imposd by federal act or treaty, and she held the same as other minor citizens of the United States and of this state held their property unless limitations were imposed thereon by subsequent sections of the Act."

The court then goes on to say, on page 665:

"In other words, construing all of the foregoing provisions of said Act together, we think it was the legislative intent to provide that the allotted lands of freedmen and mixed Indians having less than half Indian blood, under the age of 18 years if a female, and under the age of 21 if a male, may be sold under the supervision and jurisdiction of the probate courts of the state, and not otherwise."

In *Kirkpatrick* v. *Burgess*, 29 Okla. 121, 116 Pac. 764, the court says:

> "The marriage of a minor male ward member of the Cherokee Tribe of Indians of less than one-half blood does not, of itself, terminate his guardianship as to his allotment, nor abate the jurisdiction of the county court, and a guardian, under such jurisdiction, has authority to make a sale of said minor's allotted land."

In *Gill* v. *Hagerty*, 32 Okla. 407, 122 Pac. 641, the court, speaking of the Act of May 27th, say:

> "The fact that marriage does not of itself, however lawful, remove the disability of a male Creek allottee under 21 years of age, in regard to the sale of his allotment, renders it useless to discuss the very interesting question of collateral attack on a marriage contract, and the introduction of evidence tending to show that its consummation was brought about through the fraudulent conduct of other parties expecting to profit thereby."

In *Tirey* v. *Darneal*, 37 Okla. 606, 133 Pac. 614, speaking of the deed made by an Indian not of age as shown by the enrollment records, the court say:

> "The deed was void, of that there can be no doubt. Section 6, of the Act of Congress approved May 27, 1906 (35 Stat. 313, c. 199), which deals with the subject of the removal of restrictions from lands of allottees of the Five Civilized Tribes provides that the persons and property of minor allottees of said Civilized

Tribes shall, except as otherwise specifically provided by law, be subject to the control and jurisdiction of the probate courts of the State of Oklahoma. This provision of that act is in the nature of a restriction by Congress on the alienation of lands belonging to minor allottees, and can be removed only by a regular proceeding provided by statute through the instrumentality of the county court. It has long been the policy of Congress, upheld universally by the courts, that the alienation of restricted Indian allotments was not only prohibited but all such attempted conveyances were void. As was said above, this conveyance by Darneal to Tirey, by reason of the provisions of the Act of Congress, *supra*, was not voidable but void."

The foregoing decisions may be taken as typical of the class to which they belonged, and are selected for the reason that some of them have been cited in the opinions of this court. An examination discloses that the real ground of decision in all of them was the *supremacy of the federal law over the state law, and that each of the decisions is correct though sustained by unsound reasoning.*

In *Jefferson* v. *Winkler*, the question was, as we have seen, whether a deed made by an Indian minor could be given the same force and effect as a deed made by an adult by virtue of the fact she had married, and a statute permitted married minors to sell lands with the same effect as if adults. In the Kirkpatrick case, the same question in another phase was involved. In such cases, it was contended

that the county court could not appoint a guardian nor authorize a guardian to sell the lands of a minor Indian, because, under the laws of Oklahoma, marriage of itself terminated guardianship and the marriage of an Indian minor conferred upon him the right to sell his lands with the same force and effect as if an adult. In the Gill case, the Indian was again a married minor, and it was sought to set aside his deed on the ground that he had been fraudulently induced to marry in order to make the deed. In *Tirey* v. *Darneal*, the allottee was a married minor Indian of the class from whom restrictions had been removed, and it was contended that the deed made was good because of the fact of marriage. It was sought to sustain the deed or to compel the return of the purchase money before setting aside the deed. The facts being as above stated, it is evident that no question of the reimposition of restrictions or the existence of restrictions on the land notwithstanding Section 1, or whether such deeds were void or voidable, was before the court for determination. Each of the actions was brought by virtue of local statute before the expiration of minority, and in each case it was attempted not to give the deeds the same force and effect of deeds by minors, but to give to them the same force and effect as if they had been executed by adults. *To do this would make the local law dominate the federal law in the control of Indians.* This, the court held and very properly held, could not be done, but that the federal law dominated and controlled the local law.

Turning, now, to the federal authorities. In *Bell* v. *Cook*, 192 Fed. 597, the Circuit Court for the Eastern District of Oklahoma, through Judge Pollock, speaking of the Act of May 27th, say:

> "Viewed in this light, it is clear the allottee, being a minor female freedman under 18 years of age at the date of her conveyance to R. L. Cook, was free from all government restriction against her power of alienation, except such disqualifying conditions as was common to all minors under the laws of the state. As has been seen, the statute law of the state above quoted does not authorize its female citizens under 18 years of age, lawfully married, to convey their property regardless of the fact of minority, because, in contemplation of such law, the fact of marriage in and of itself removes this disability of minority; yet, as to such wards of the government as was the allottee freedwoman in this case, although married, still, as shown by the public rolls, she remained a minor under the act in question. Therefore, she could dispose of her property by that method only open under the law of the state to persons of her class, regardless of the fact of her marriage."

In *Truskett* v. *Closser*, 198 Fed. 835, the Circuit Court of Appeals of the Eighth Circuit, after setting out the facts showing the attempted removal of the disabilities of nonage of a minor Indian citizen, say:

> "The exclusive right to determine when Goodman was of age was in Congress so far

> as his allotment was concerned. It declared that he should not become of age until he was twenty-one. A law of Oklahoma which declared that he should become of age at twenty would be in conflict with the Act of Congress, and would be void, so any act of the state which authorized any of its courts to determine that Goodman became of age when he was twenty, or that, at such age, he had the rights of an adult, would be in contravention of the same law, and would also be void."

And, in speaking of the *Jefferson* v. *Winkler* case, the court say:

> "The construction of this Act came before the Supreme Court of Oklahoma in the case of *Jefferson* v. *Winkler*, 26 Okla. 653, 110 Pac. 755. In that case, an Indian girl married when she was under 18, and, while under that age conveyed her allotment. It was held that, under the general law of Oklahoma, the marriage emancipated her, but this general law could not have effect in her case in view of the provisions of the said Act of May 27, 1908, and that her conveyance was void."

In *Ligon* v. *Hertzel* (not officially reported), the District Court of the Eastern District of Oklahoma say:

> "By reference to the Act of Congress approved May 27, 1908, it is seen (Section 1) that all the restrictions upon alienation of the land of this plaintiff had been removed at the time of the execution of this lease, but that, for the purpose of this consideration, she must

be considered as under the age of 18 when the lease was made (Section 3), and was, therefore, a minor (Section 2), and in her person and property was subject to the jurisdiction of the probate courts of the State of Oklahoma. Being a minor, her right to execute the lease must be decided by the laws of the State of Oklahoma in force at that time."

In *Truskett* v. *Closser*, 236 U. S. 223, this court, speaking of the Act of May 27th, say:

"These sections are circumstantial and contain the elements of decision. Section 2 defines minors, male and female, and provides for the disposition of their property under, as stated, rules and regulations provided by the Secretary of the Interior, and declares that the jurisdiction of the probate courts of the state shall be subject to its provisions. Section 6 declares to what courts the property of minors so defined shall be subject. Explicitly, such property is made 'subject to the jurisdiction of the probate courts of the State of Oklahoma.' The qualification 'except as otherwise specifically provided by law' means, as said by the Circuit Court of Appeals, federal law and not state law."

Further along in the opinion, the court say:

"and the courts, both state and federal, have found no difficulty in determining its meaning or its dominance over the provisions of the state law."

This court, then, speaking of the Jefferson-Winkler case, and giving what it considers the grounds

on which the state court based that decision, say:

> "The court, therefore, decided, upon a construction of the Act of May 27, 1908, and of the laws of the state, that the latter, removing the disability of minority, do not extend to minors as defined by the Act of Congress."

A careful consideration of these cases shows that the real question involved in all of them was the dominance of the federal law over the state law, in reference to the validity of the deeds attacked. The state courts decided the question on the same grounds that the federal courts did, though the real reason was not as explicitly given, and some reasons, in themselves unsound, were given. The federal courts unmistakably give their reasons why the deeds attacked were subject thereto, the reason of the federal courts being based alone upon the dominance of the federal statute, thus giving the true reason. So we say that, eliminating unnecessary verbiage and unnecessary reasoning from the opinions of the Supreme Court of Oklahoma, the decision in each of the cases was correct and is in entire accord with the federal decisions, and, together, these decisions establish, and, when rightly considered, establish alone, the conclusion that the Act of May 27, from the classes named, removes the restrictions on the lands of minors; that such lands are free from all restrictions as is declared by such Act, but that such Act prescribes the period of minority, and, during such period so prescribed, no act of the Legislature of Oklahoma, no judicial dec-

laration of its courts, can abrogate or do away with the effect of such minority and permit the Indian minor to deal with his land with the same force and effect as if he were in fact of age. This is the correct construction of the Act of May 27th. It is one in direct accord with the language of the Act. It is in consonance with its declared purpose. It does not take from or add to the Act, and, Congress having declared the Indians to be minors during certain prescribed periods of time, the *disabilities as well as the benefits,* if such there be, of minority attached to the declared status, and no legislative Act, no judicial decree of the state authorities could take *from nor add to such disabilities, could increase or decrease, in any way or by any method, the prescribed period of minority,* nor, during such prescribed period, defeat the purpose of Congres by indirectly permitting or authorizing a conveyance of lands by the minors with the *same force and binding effect as if executed by adults.* Recurring again to the Oklahoma decisions, and especially to the latter ones, and selecting therefrom typical cases, we find that the Oklahoma court now recognizes the basis of the decisions in the earlier cases to be as we have outlined.

In *Collins Investment Co.* v. *Beard,* 46 Okla. 310, 148 Pac. 846, the court say:

> "In other words, if a state law, by its language, or through its particular construction or its operation, would permit the alienation of a restricted Indian allotment, or render a

deed thereto effective where the land would not be alienable or the deed thereto effective under the Act of Congress dealing with the subject-matter, then the state law fails, and this because the federal government retained jurisdiction in these Indian matters to the extent stated in the Enabling Act, under the terms of which Oklahoma became a state, and this reservation of jurisdiction was assented to in the Constitution which the people adopted. To give the desired construction to either of the statutes under consideration would be in effect to accomplish the removal of federal restrictions from the sale of allotted lands by means of state legislation. Once conceding this principle, it is easily seen that the federal control would be interfered with and might ultimately be entirely suspended. No such construction is possible."

In *Klaus* v. *Campbell-Ratcliff Land Co.*, 48 Okla., 150 Pac. 676, speaking of the *Jefferson-Winkler* case, the Supreme Court of Oklahoma say:

"This court held, in *Jefferson* v. *Winkler*, 26 Okla. 653, 110 Pac. 755, in dealing with a minor of the Creek Nation, that a minor includes males under the age of 21 and females under the age of 18 years, and the marriage of such minor does not confer upon him or her authority to sell his land or her allotted land independent of the supervision of the probate courts of the state."

In the Collins case, *supra*, the Oklahoma court again says:

"The statutes above referred to need no analysis or even a construction here, for the

> reason that, when the question of the removal of restrictions from allotted lands, or the right of alienation of such lands, or the power of alienation is involved, we must look to the Acts of Congress, and to those acts alone."

It is thus seen that this court, the Circuit Court of Appeals of the Eighth Circuit, the Supreme Court of the State of Oklahoma, and the local federal courts of such state have, in effect, put the same construction upon the Act of May 27, 1908, as we do, and have interpreted *Jefferson* v. *Winkler* in the same manner that we do; that is, that the sole dominant question necessary for decision in such case and the cases that have followed it, and the question really decided, was the control and precedence of federal law on this subject over the state laws, and that the necessary result from all of such decisions is that, as to members of the Five Civilized Tribes of less than half blood, the Act removed all restrictions and placed minor owners of such land, in reference to their lands, in the identical position they would occupy if they were not Indians, except that neither the state courts nor state legislature, nor both combined, could change the status of such members as minors. They could neither prevent action by the minor owners which minors would be authorized to take, nor could they give effect to any such act or make it more binding on the minor than would the same action be without state legislative or judicial declaration.

IV.

That acts are spoken of in statutes and judicial decisions as being void does not necessarily mean such acts are void in the technical meaning of such term, but, more often, mean that the acts prohibited are declared void or voidable, as acts are rarely, if ever, void in the full technical significance of such term.

Assuming, for the purposes of the argument, that the courts of Oklahoma have held deeds and leases of minor Indian allottees of less than half blood to be void, it does not necessarily follow that such transactions are absolutely void in the sense that no right or obligation can be founded upon or grow out of them, and does not necessarily mean any more than to have said such transactions were voidable. Courts will long hesitate before they declare an act or transaction absolutely void in the technical sense of the word, and will not do so unless driven thereto by express statutory enactment or the act itself is so inherently vicious and immoral as to shock the conscience of mankind, and no right growing out of it can be enforced except by consummating the moral wrong with which the transaction is tainted or giving effect to the vicious and forbidden purpose sought to be prevented. Except where a transaction is founded on or grows out of some inhering moral obliquity, disregard of human rights, or endangers the established customs and institutions of organized so-

ciety, no contract or act has ever been or ever will be declared by a court to be absolutely void in the technical meaning of that term, unless such a holding is compelled by the express letter and commandment of some statute. The word "void" generally means "voidable," and, at this time, such may be said to be its primary meaning, and declarations in opinions of courts and in statutes that certain things or acts are void usually mean only that such things are voidable, and are not to be declared void in the sense that they are incapable of conferring any right, or ratification, or affirmance unless, from the context, such construction of the word is essential to carry into effect the purpose and design of the law, or is necessary to prevent the court from giving its aid or countenance to a transaction innately immoral. It is, perhaps, unnecessary to quote any authority in support of the doctrine above announced, and we will only do so to a very limited extent.

In *Weeks* v. *Bridgman*, 159 U. S. 541, 40 L. Ed. 253, this court had before it for construction an act which provided that, as to certain lands not contained in a prescribed list, the act as to such lands "shall be perfectly null and void and no right, title, claim or interest shall be conveyed thereby." This language seems to be as strong as can well be used, and to be all embracing. It is hard to conceive how a thing can be more than

"perfectly null and void." In construing this act, the court say:

> "A distinction between void and voidable acts need not be discussed. It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act, while things are often said to be void which are without validity until affirmed."

In *McMichael* v. *Murphy*, 70 Pac. 189, the Supreme Court of the Territory of Oklahoma say:

> "The distinction between a void and voidable act is clearly and tersely stated by Mr. Chief Justice Fuller in *Weeks* v. *Bridgman*, 159 U. S. 541, 40 L. Ed. 253, as follows: 'It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act, while things are often said to be void which are without validity until confirmed.' Applying these decisions, which this court must regard as final and authoritative, to the case at bar, it follows that White's homestead entry was *prima facie* valid; that its validity had to be determined by a competent tribunal, and that tribunal was the Land Department of the United States."

In *Ewell* v. *Daggs*, 108 U. S. 143, 27 L. Ed. 682, the court say:

> "It is quite true that the usury statute referred to declares a contract of loan, so far as the whole interest is concerned, to be void and of no effect. But these words are often used in statutes and legal documents such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is capable of being avoided and not as meaning that the act or transaction is absolutely a nullity as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances."

In *Downs* v. *Blount*, 170 Fed. 15, the court had before it a married woman's deed not acknowledged in accordance with the laws of Texas, and such deeds had been declared by the Supreme Court of Texas void. In passing on the question of whether the deed was void or voidable, the court say:

> "Much of the argument of learned counsel for the defendants in error is based on the proposition that the deed in question is void. The application of the statute to this deed is referred to as an attempt 'to make a deed where none existed.' On the other hand, the attorney for the plaintiff in error insists that the deed offered in evidence was not absolutely void, but that it is an instrument defectively executed, which at least conferred equitable rights. These contentions present a question of much importance, for while the

legislature might have power to pass an act which removes a defect in an existing inchoate or ineffective contract, it might not have the power to create a conveyance—to make a contract between the parties. Cases are cited from the Texas court of last resort, saying in plain words that the deed of a married woman defectively acknowledged and proved, is void. If we accepted these expressions as conveying the real meaning of the court, these cases would be conclusive as to this contention. But we know that the word 'void' is often used in the sense of voidable, or invalid, or non-enforceable; that it has almost lost its primary meaning and when it is found in a statute or judicial opinion it is often necessary to resort to the context to determine precisely what meaning is to be given it. • • • We are of the opinion that the deed was admissible in evidence, and, when admitted, it should be 'given the same effect as if it were not so defective.' This conclusion is also applicable to the other deed which was excluded on the same grounds."

In Allis v. *Billings*, 6 Metcalf 415, the Supreme Court of Massachusetts say:

"The question raised in the present case is whether the deed of one who is insane at the time of the execution thereof is void absolutely, or merely voidable. The term void, as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contra-distinguished from voidable, it being frequently introduced, even

by legal writers and jurists, where the purpose is nothing further than to indicate that a contract is invalid and not binding in law. But the distinction between the terms void and voidable, in their application to contracts, is often one of great practical importance, and whenever entire technical accuracy is required, the term void can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification. The question then arises, is the deed of a person *non compos mentis* of such a character that it is incapable of confirmation? This point is not now for the first time raised, but has been the subject of comment both by elementary writers and in judicial opinions. Mr. Justice Blackstone, in his Commentaties, Vol. II, p. 291, states the doctrine thus: 'Idiots and persons of non-sane memory, infants and persons under duress, are not thoroughly disabled to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable and not actually void.' Chancellor Kent says: 'By the common law a deed made by a person *non compos* is voidable only and not void.' 2 Kent Com. (4th ed. 451.) In *Waite* v. *Maxwell*, 5 Pick, 217, this court adopted the same principle, and directly rules that the deed of *non compos*, not under guardianship, was not void, but voidable. * * * It may seem somewhat absurd to hold that a deed should have any effect when wanting in one of the essential elements of a valid contract, viz., that of parties capable of giving an assent to such contract. But this obligation as strongly applies to cases of deeds executed by infants who are alike wanting in

capacity to make a binding contract. Yet this principle of giving so much effect to the contract as removes it beyond that of a mere nullity, and renders it, to some present purposes, effectual and susceptible of complete jurisdictional ratification, is well settled and understood as to infants who enter into contracts, and it will be found that there is a common principle on this subject, alike applicable to the inability of the contracting party, arising from infancy or lunacy."

In *Haggart* v. *Wilczinski*, 143 Fed. 22, the Circuit Court of Appeals say:

"The Mississippi Supreme Court used the expression that the sale was 'absolutely void,' but the point passed on was raised by a demurrer to the part of the bill that alleged title in Allen, so the decision was to the effect that the sale and conveyance by the substituted trustee was 'absolutely void' as an attempted transfer of the title to the land. The word 'void' is so often used in the sense of 'voidable' as to have lost its primary meaning, and, when it is found in a statute or judicial opinion, it is ordinarily necessary to resort to the context in order to determine precisely what meaning is to be given to it. The word, when confined to the effect of the sale and conveyance as a transfer of title, the matter under consideration, was used by the learned Supreme Court with accuracy and technical precision. A purchase by a trustee at his own sale is certainly void as to the beneficiary in the trust. It is void because the seller is not permitted to buy at his own sale. The word

'void,' however, is frequently used even by legal writers and jurists where the purpose is nothing further than to indicate that a contract is invalid and not binding in law."

In *Hammond on Contract*, Sec. 135, it is said:

"The courts are not always discriminating in the use of the words 'voidable' and 'void,' and where the word 'void' is often used, 'voidable' is more obviously meant. This want of discrimination will be found to occur in many of the cases in terms holding infants' contracts to be void. A majority of these cases appear to establish that the contract cannot be enforced against an infant or some other collateral point equally consistent with its being merely voidable and not void. In any event, by the weight of authority both in America and England, the doctrine that an infant's contract may be absolutely void does not prevail, and, subject to one exception, his contracts are valid if he elects to treat them so when he comes of age."

It is difficult to see why a deed executed by a minor Indian citizen, even treating the Act of May 27, 1908, as creating a restriction on alienation, should be void instead of voidable; should fall without instead of being included within the general rule. The act of May 27th, does not so provide, and it is evident from a review of the whole legislation on the subject that such was not the intention of Congress. It did not intend such conveyances, after the passage of the Act of May 27, 1908, to be void in

the precise technical meaning of that term, for in the Creek and Cherokee Agreements it declared certain conveyances and contracts therein prohibited should be void, incapable of ratification and that no rule of estoppel should apply.

Congress has never hesitated to declare forbidden leases, contracts and deeds incapable of ratification, affirmance or adoption, when it so intended, in language so plain and explicit as to be incapable of being misunderstood, and when in regard to the same subject matter, in reference to the same classes of people, dealing with the same character of contracts, it in prior instances so expressly declares and in subsequent instances fails to so declare, is not the implication emphatic and convincing that it did not so intend? Is not such failure equivalent to the withdrawal of the theretofore existing express prohibition? It is not an implied acknowledgment that the theretofore existing stringent prohibition was too severe and drastic and that the interests and welfare of the special objects of its solititude and paternal care would be advanced by its omission? Is not this presumption more weighty, entitled to more respect, more appealing to our confidence and reason when the omission occurs in an act whose declared purpose is to remove all restrictions from certain designated classes and in nearly, if not all cases, decreasing the then existing restrictions?

V.

Conceding that the lease of August 24, 1909, was void and, also, the lease of February 8, 1911, they were susceptible of adoption or ratification, and, in fact, were adopted, ratified and confirmed, and, such being the fact, this cause should be affirmed, although this Court may be of the opinion that the construction given the Act of May 27, 1908, by the Supreme Court of Oklahoma, is erroneous.

The lease of February 8, 1911, was made when Gilcrease was in fact of age, and is, as was found and determined by the Oklahoma courts, free of any vice and to be within itself a sufficient oil and gas mining lease. Therefore, it is binding between the parties, and conclusive of this case unless this court, disregarding the rule announced by the Circuit Court of Appeals of the Eighth Circuit and the Supreme Court of Oklahoma in many cases, should determine that, at the date of its execution, Gilcrease was a minor as shown by the enrollment records. In such event, it is necessary to determine whether such lease has been ratified or adopted if it could be ratified and adopted. We assume that this court will not set aside the deliberate judgment of the trial court and that of the Supreme Court upholding this lease, merely on account of an erroneous construction of the Act of May 27, but if, notwithstanding such erroneous construction, the judgment in this cause should have been affirmed by the Supreme Court of Oklahoma, this court will

leave such judgment in force and effect, and merely correct the erroneous construction of the Act of May 27.

After the execution of this contract, Gilcrease permitted, as shown by the opinion of the Supreme Court of Oklahoma, the defendants to develop the land described in the lease, and incurred a liability therefor of $60,000.00 (Record, p. 118, marg. p. 940); and after Gilcrease was of age as shown by his own contention under any construction of the Act of May 27, defendant Martin released a liability of $12,500.00, with the knowledge and in the presence of Gilcrease, on the assumed validity of such lease (Printed Record, p. 118, marg. p. 940), and Gilcrease purchased from Martin, on December 11, 1911, three-fourths of Martin's one-fourth interest in the lease (Printed Record, marg. p. 940), for an agreed consideration, as shown by the petition of plaintiff, of $31,000.00, and, at the same time permitted Martin to convey his remaining interest to G. R. McCullough, and signed division orders by which pipe line companies were to pay to Gilcrease 9/16 of the proceeds of the oil produced from said land, and the defendants' 7/16 of the oil produced (Stipulation, Printed Record, p. 187). These acts constitute an affirmance or adoption of the lease of February 8, 1911, in fact, and the only question that can be raised is whether the lease could be adopted or ratified as a matter of law.

The Original Creek Agreement, as amended and

supplemented by the Supplemental Creek Agreement, 32 Stat. L. 500, in paragraph 16, declares that any agreement or conveyance of any kind or character, violative of its provisions, should be absolutely void and not susceptible of ratification in any manner, and that no rule of estoppel should ever apply to prevent the assertion of its invalidity. After the enactment of the Supplemental Treaty, the Act of April 26, 1906, was passed forbidding certain transactions with Indians and Indian lands. This act, however, did not declare that Indians, as to acts forbidden, should be deprived of the power to ratify or confirm such acts when freed from Departmental control and when the period against alienation had expired, or that no rule of estoppel should ever apply to prevent the assertion of invalidity. The Act of May 27 repeals all restrictions theretofore existing in reference to the lands of the Five Civilized Tribes, and it is to be remarked that such act, in no place except Section 5, declares any of the forbidden acts to be void, and Section 5 of the Act, relating to sales and leases of restricted lands, while under restrictions, declares such sales and leases to be absolutely void, but does not contain any provision against the power of the Indian to confirm or ratify the forbidden acts after the expiration or removal of restrictions, nor does it provide against the application of the rule of estoppel; and the absence of such provision is to be especially remarked for the reason that Section 19, of

the Act of April 26, 1906, which is repealed by the Act of May 27, 1908, expressly provides that any deed executed in performance of a contract, made while the land was subject to restrictions, should be void. This clearly shows that, under the Creek Treaty, and under the Act of April 26, 1906, Congress intended to prevent affirmance of contracts which were prohibited at the time of their execution, and to prevent having the doctrine of estoppel applied to Indians to prevent them raising the question of such invalidity. Such an intention, purpose and design is wholly absent from the Act of May 27. The omission from the Act of May 27, of the language preventing ratification and adoption, and prohibiting the application of the rule of estoppel shows that Congress did not intend the things prohibited by the Act of May 27, 1908, to be absolutely void in the sense that they could not be ratified or adopted.

The prohibition against adoption, ratification and affirmance of a contract is restriction on alienation. The Act of May 27, 1908, removed the prohibition against doing the acts set out in the treaties and the Act of April 26. It also repealed the further restrictions against alienation which forbade the ratification and approval of conveyances at a time when, but for such prohibition, the Indian could ratify and affirm. This shows that, *when Congress intended a prohibited act, in reference to an Indian's control over his allotment, to be incapable of ratifi-*

cation, it has not hesitated in express words so to declare. It also shows that Congress did not believe that the restrictions against alienation for a certain period of time were sufficient to prevent the ratification, affirmance or adoption of such prohibited contracts when made where such affirmance or adoption took place at a time when the Indian was free from restriction, else it would not have deemed it necessary to have so declared at length and with emphasis.

At the time of the passage of the Act of May 27, 1908, there existed two restrictions resting on the lands of minor Creek Indians of less than half blood. One was the direct and absolute prohibition against a sale or lease, and declaring such sale to be void. The other restriction was the prohibition against ratification of any such deed, lease, or contract, and declaring that no rule of estoppel should ever affect the right to assert the invalidity of such deed, lease or agreement. The passage of the Act of May 27, 1908, repealed all theretofore existing restrictions, and, conceding for the purposes of the argument that the Act of May 27 places a restriction on the lands of minors of less than half blood, we then have two distinct stages of the policy in reference to alienation of Indian lands: First, one in which Congress did not content itself with merely declaring deeds, leases, etc., void or absolutely void, but provided that none of such instruments should be ratified, confirmed or adopted, and

that no rule of estoppel should prevail against the assertion of the invalidity of such instruments; second, one in which Congress believed the best interest of the Indian would be subserved by merely declaring the deeds, leases, etc., void, and eliminating the further prohibition or restriction against alienation of adoption, ratification or affirmance, and believed it unwise to again declare against the application of the rule of estoppel. No provision against ratification or adoption, no prohibition against the application of a rule of estoppel being found in the Act of May 27, 1908, *we are forced to conclude that no prohibition was intended.*

Congress must be held to have been acquainted with legislative history, and to have passed the Act of May 27, 1908, and used the language therein contained, with full knowledge that the effect of the language and of the passage of the act would be to repeal all statutory enactments prohibiting confirmation, adoption, ratification or estoppel, as applied to prohibited Indian contracts.

Conceding for the purposes of the argument that the Act of May 27, 1908, imposes a restriction on land based on the fact of minority alone, what in that act prevents a confirmation, ratification, affirmance or adoption of a deed or lease made to the land after the Indian has arrived at full age? We have seen there is no express provision prohibiting the same. When of full age the Indian would have the right to make a new deed or lease

What then would prevent the adoption or ratification of an existing lease or deed? It would not be immoral or illegal in its terms. *Why grant the Indian the power to make a deed or lease and say you cannot ratify or adopt an existing deed or lease?* Is not the latter included in the first? What is it but a species, a method and manner of making a deed or lease? We have seen that the Act of May 27, 1908, repeals the provisions of the Creek and other treaties providing that certain instruments should be incapable of ratification and affirmance, and that no rule of estoppel should ever apply. And the courts of Oklahoma have declared such act frees land of the character involved in this action of all restraints imposed by Federal treaty or acts except such as may be found in the act itself. A perusal of that act fails to disclose any provision declaring contracts made in reference to lands on which restrictions have been removed subsequent to the act to be void. By express wording of the Act of May 27, 1908, the only contracts, *et cetera*, covering lands from which restrictions are not removed by such act which are declared void are contracts made prior to or after the passage of that act and made at a time when *such lands were restricted.* The only way in which we can hold such contracts void and incapable of ratification is from language used by the Supreme Court of Oklahoma in cases where such question was not before the court.

Under the Act of May 27, 1908, or rather the construction of that act contended for by petitioner, Gilcrease, either on February 8, 1911, or June 9, 1911, would have full authority to deal with his land. Having authority then to deed or lease, he would necessarily have authority to ratify, adopt or confirm a previous deed or lease, unless prohibited by express provision of statute. The unrestricted ownership of the land of and by itself would imply such power as it would be but *one of the methods by which the land could be conveyed.* In *United States* v. *Wright*, 197 Fed. 297, the Circuit Court of Appeals of this circuit, having before it certain oil and gas mining leases made by a Quapaw minor Indian under restrictions and its power to adopt them said:

> "Most of the questions here raised were disposed of in those cases, but in none of them was the question of infancy in any way involved. It has never been held that the government was any more the guardian of a minor Indian than of adults, but even if there was some peculiar guardianship of minor Indians, that would not enable the government to bring suit after the Indian had reached his majority, to set aside leases made during his infancy. After he reached his majority Hunt re-dated, re-executed and extended this lease. This was a distinct ratification by him."

In *United States* v. *Western Investment Com-*

pany et al., 226 Fed. 726, the Circuit Court of Appeals by Judge Adams, said:

> "Act May 27, 1908, 35 Stat. 312, prohibiting the conveyance of any interest in an allotment by a full-blood Indian heir of the allottee without the approval of the court having jurisdiction of the settlement of the estate of the deceased allottee, renders a deed of such heir voidable if made without such approval."

This case would seem to hold that a deed made by a full-blood Indian, not in accordance with the Act of May 27th, could be adopted and ratified by such Indian at any time after his restrictions should be removed. And why not? *Why with the power and authority to sell should it be necessary to go through the form of writing a new deed* instead of adopting an already existing deed? *Each of the acts would in essence be the same, as the result of each would be the sale of the land.*

In *Hartman* v. *Butterfield Lumber Company*, 199 U. S. 235, 5 L. Ed. 217, the Supreme Court of the United States say:

> "For the purposes of this case it may be conceded that the contract made before the patent, was, by virtue of the policy of the United States, as disclosed by its statutes, void, and could not have been enforced by the Norwood & Butterfield Company, but the contract was not inherently vicious and immoral. It was simply void because in conflict with the Federal statutes. *Anderson* v. *Carkins*, 135 U. S. 483, 34 L. Ed. 272, 10 Sup. Ct.

905. When the patent issued the full legal title passed to the patentee. He could do with the land that which he saw fit; sell or give it away, and if he voluntarily conveyed it he could not thereafter repudiate the conveyance. He might well have thought that having received the money from the company to enable him to pay for the land, it was equitable that he should convey that interest which he had agreed to convey. At any rate he had a right to exercise a choice in the matter, and, having exercised it, he at least cannot complain."

In *Kineer* v. *Davis*, 167 Pac. 753, not yet officially reported, it was sought to set aside the deed of an Indian of one-eighth blood, executed on August 12, 1908, on the ground that, prior thereto and while under restrictions, the Indian had executed a deed for the same land, and, at the same time, entered into a contract to convey such land on the expiration or removal of restrictions. It was contended that the two deeds were to the same grantee, the last deed was void, because the Act of April 26 expressly declared void a deed made in pursuance of a contract entered into prior to removal of restrictions and the last deed was made to carry into effect such a contract. In passing on the question, the court say:

"It is urged by counsel that the deed of August 12, 1908, was void under the terms of the Act of Congress of April 26, 1906, (34 Stat. L. 137). The lower court sustained this contention, and directed a verdict in favor of the

defendant in error. The deed of August 12, 1908, is not to be construed under the terms of the Act of April 26, 1906, but is to be construed under the Act of Congress of May 27, 1908, (35 Stat. L. 312). That the last mentioned act repealed the former is no longer open to dispute. *MaHarry* v. *Eatman*, 29 Okla. 46, 116 Pac. 935; *Lewis* v. *Allen*, 42 Okla. 584, 142 Pac. 384; *Henley* v. *Davis*, 156 Pac. 337; *McKeever* v. *Carter*, 157 Pac. 56; *Ehrig* v. *Adams*, 169 Pac. (No. 5077, not yet officially reported). If the Act of Congress of April 26, 1906, controlled, the second deed might properly be held void, because of the contract entered into prior to the removal of restrictions; that act containing the express provision making such deeds void. The Act of May 27, 1908, contains no such provision. It provides that the lands allotted to Indians of less than one-half blood, 'shall be free from restrictions.' Had it been the purpose of Congress to continue restrictions against selling in pursuance to a contract entered into prior to the removal of restrictions, a provision like that contained in Section 19 of the Act of April 26, 1906, would have been incorporated in the repealing act. We are not unmindful of the rule urged by counsel, to the effect that a void deed cannot be confirmed, and that fraud which renders the original deed void taints and destroys a confirmatory deed. No such question is presented under the facts in this case; there being no allegation of fraud or duress. The first deed was void because it was prohibited by law, and not from fraud or duress. It was not an immoral contract, merely an illegal one. When the allottee ex-

> cuted the deed of August 12, 1908, there were no restrictions imposed by the law against his voluntary alienation of the land in question. He held the land free from all restrictions against his voluntary conveyance. It appears that he had been advised by the United States Indian Agent that his deed and contract entered into prior to the removal of restrictions were void, and that he was under no legal obligations to convey the land to McGuffin. Notwithstanding this information, he voluntarily sought McGuffin, and offered to execute the deed on payment of $140.00, the balance of the consideration mentioned in the contract. He was free at that time to do so."

In *Welch v. Ellis*, 163 Pac. 321, not yet officially reported, the Supreme Court of Oklahoma held a new deed made without consideration, by a Cherokee freedman, to take the place of a deed executed by him when a minor and, as held by the court, under restrictions, to be good, and, in disposing of the contention that such deed was void, say:

> "It must not be forgotten that the right of a citizen of the Five Civilized Tribes to enter into a valid and binding contract is precisely the same as that of the ordinary citizen of the state, except as limited or restricted by some Act of Congress."

The court then further say:

> "It is settled in this jurisdiction that the Act of May 27, 1908, (35 Stat. L. 312, c. 199) was intended as a substitute for all prior laws,

and operated to repeal all the previous acts of like nature, and to establish a new scheme of restrictions governing the lands of citizens of the Five Civilized Tribes (citing authorities). At the time of the passage of the Act of May 27, 1908, the restrictions upon the lands of freedmen, both as to surplus and homestead allotments, were removed. Therefore, we must look to Section 5 of the Act in determining the validity or invalidity of the deeds to both tracts."

The court then says:

"The deed was made after the plaintiff had attained his majority, is a grant in *praesenti*, and does not purport to affect the title to the land prior to removal of restrictions therefrom. The Act of Congress does not in terms or by implication purport to confer upon the Indians the full power to alienate their lands upon reaching their majority, upon condition that they receive full value in consideration for their sale. The general purpose of Congress was to provide restrictions upon alienation during such a period as would be sufficient in their judgment to fit the Indian wards of the government to deal at arm's length with their white neighbors in the matter of the disposal of their allotted lands. In the case at bar minority was the sole remaining disability imposed by law, both as to surplus and homestead, at the time the various deeds were executed. It will be observed that none of the acts of Congress removing restrictions attempt to make the right to convey, after restrictions are removed, depend upon the adequacy of the

consideration received by the grantor. In that respect, after the rstrictions upon alienation are removed, the Indian citizen stands upon an equality with the ordinary citizen of the state."

The court then, after reviewing some Oklahoma decisions, goes on to say:

"So we conclude that, upon the plaintiff attaining his majority, the whole legal title to his lands vested in him; that thereafter he could dispose of it as he saw fit—give it away, or sell it for any consideration, either legal or moral, which seemed to him sufficient. As the plaintiff herein voluntarily conveyed his land after attaining his majority, he cannot now, after the lapse of many years, repudiate the conveyance upon any except the ordinary equitable grounds. This latest deed to his surplus allotment not being violative of any statute and there being no equitable grounds for setting it aside alleged or proven it must stand. Since there was a legal as well as a moral obligation upon the plaintiff to restore the money received from Ellis in consideration for the void deed, it seems to us that his voluntary recognition of this obligation, after attaining his majority, was as commendable as such action is generally rare in this class of cases."

In *McKeever* v. *Carter et al.*, 53 Okla. 360, 157 Pac. 56, this court, in the third syllabus, say:

"The provisions of section 5 of the Act of Congress of May 27, 1908, (c. 199, 35 Stat. L.,

p. 3313), 'that any attempted alienation, encumbrance, deed, mortgage, contract to sell, power of attorney or other instrument or method of encumbering real estate made before or after the approval of this act which affects the title of the land allotted to allottees of the Five Civilized Tribes, prior to the removal of the restrictions therefrom, and also any lease of such restricted lands made in violation of law, or after the approval of this act, shall be absolutely null and void,' does not affect the deed made after all restrictions upon the alienation of the lands therein described were removed."

In the body of the opinion in said case the court, discussing Section 5 of the Act of May 27, 1908, say:

"By this provision any deed or contract to sell made before the removal of restrictions would be void, and in case of a contract to sell specific performance would be denied. But this does not necessarily mean that after the allottee has attained his majority, where all restrictions have been removed, he may not then, upon a sufficient consideration, execute a valid conveyance to his allotted lands."

The court then goes on to review the Act of April 26, 1906, and contrasts it with the Act of May 27, 1908, and in this connection say:

"By the language of this section a deed made after the removal of restrictions, if made in pursuance of an agreement entered into before the removal of such restrictions, is

void. The Act of May 27, 1908, contains no such language as will be seen from the section quoted *supra*, but simply enacts that all attempted alienations and contracts to sell entered into before removal of restrictions are declared void. There is no prohibition against selling after restrictions are removed."

The court then reviews the cases of *Lewis* v. *Allen*, and *Casey* v. *Bingham*, and then say:

"In the light of these authorities it would seem that even though the agreement to convey the land entered into by the plaintiff with the defendant, and while plaintiff was a minor, was void, and that same could not be enforced had plaintiff declined to perform the same, yet there was no legal impediment in the way of plaintiff conveying his lands to any grantee he chose after reaching his majority, upon any legal consideration which he saw fit to accept."

The court then says further:

"There is no evidence of coercion, undue influence, or other grounds of equitable interference that would impeach either of said last two named conveyances, and if plaintiff was, on the date of their execution, an adult, he was capable in law of conveying said lands to whomsoever he chose, for any lawful consideration, and could, if he saw fit, give said lands away; and, when he executed and delivered these deeds, and accepted the consideration, said deeds were valid and binding conveyances, and operated to transfer plaintiff's title to the grantee therein named, provided he had then reached his majority."

The court then reviews the case of *Ehrig* v. *Adams*, 152 Pac. 594, which held a deed ratifying and confirming a deed made during minority was void, and of that case say:

> "The opinion is based on the theory that the conveyance to Adams prior to the removal of restrictions was void and incapable of ratification, and that the second deed to the same grantee could not operate to pass the allottee's title because tainted with the same illegality. This might have been true prior to the passage of the Act of Congress of May 27, 1908, but as we have seen that act was intended as a revision of the entire subject of restrictions on the character of lands here involved, and operated as a repeal of the Act of April 26, 1906. The opinion in this case is in conflict with the opinion in *Lewis* v. *Allen*, *supra*, *Henly* v. *Davis*, *supra*, and the views herein expressed, and is hereby overruled."

The court, further speaking of the construction of the Act of May 27, 1908, say:

> "This has been the construction placed upon that act by the Department of Justice. It is a matter of common knowledge to the bench and bar of this state, that the United States, acting under the powers of guardianship, instituted a large number of suits in the United States Court for the Eastern District of this state to cancel and remove as clouds upon the title of allottees a vast number of conveyances which it was alleged had been procured thereto in violation of the congressional restrictions. Since the passage of the Act of May 27, 1908,

it has been the policy of the Department to investigate each individual case, and where sufficient consideration has been paid for the lands purchased and restrictions have been removed so that valid conveyances could be executed to permit the title of the purchaser to be perfected by the execution of new conveyances, and to attain this result the lands conveyed have frequently been appraised, and where the consideration paid in the former conveyances was not adequate, upon payment of an additional sum, which, together with the amount already paid, would equal the fair value of the land, the suits by the government have been dismissed, and many thousands of titles involved have in this way been quieted."

In *Henly* v. *Davis*, 156 Pac. 337, not officially reported, the court, through Commissioner Bleakmore, says:

"The only restriction upon alienation of the allotted land of the plaintiff herein imposed or continued in force by the Act of May 27, 1908, was that which rendered her personally powerless to contract with reference thereto while a minor as defined by that act. After she became eighteen years of age, as shown by the enrollment records of the Commissioner to the Five Civilized Tribes, that restriction was *ipso facto* removed, and that act, having spent its force so far as her allotment and its future disposition were concerned, became inoperative. The deed of June 2, 1910, is apparently a separate and independent conveyance voluntarily made by the plaintiff, the execution of which was perhaps prompted by a

sense of her moral obligation to the defendant. The land was then hers, free from all restrictions upon alienation, and she could part with it to whomsoever she chose upon any lawful consideration she saw fit to accept, or without consideration. When she thus conveyed it by proper deed for the recited consideration of $1.00 and other valuable considerations, such conveyance was binding upon her."

In *Lewis* v. *Allen*, 42 Okla. 584, 142 Pac. 384, the court, speaking of a conveyance made after the Indian had arrived at majority, and executed in accordance with an agreement made during minority, that she should do so when she became of age, say:

"Mrs. Lewis knew at the time she entererd into the contract for the second deed, and also at the time of executing this deed, that she had taken $4,400.00 of Allen's money, for an invalid deed; that she and her husband had spent this money; and that she still held the legal title to the land; that she was in need of funds to assist her husband out of trouble, and she wanted to help him; that she was under no legal obligation to give the second deed, but that, by doing so, she could get money to relieve her pressing necessities, and at the same time discharge a moral obligation imposed upon her by the circumstances connected with the first deed. The jury had a right to, and doubtless did, take all these things into consideration in finding that the $500.00 was an adequate consideration for the second deed * * * We do not know what

weight or influence the moral obligation had as an inducing cause in prompting Mrs. Lewis to enter into the contract for the deed and in performing this contract, but after the delivery of the deed, it then became a legal and binding conveyance, and the court below was right in so holding."

It is difficult to conceive if a minor's deed or lease was absolutely void, incapable of ratification or adoption, how there could be any moral obligation resting upon anyone in connection with the transaction, how any court could speak of the *moral obligation imposed by such absolutely illegal and void contract as an inducing cause* to enter into another contract, and take *such consideration to be sufficient to sustain a subsequent deed or contract founded thereon.* To speak of a moral obligation in such connection is a contradiction in terms. There cannot rest upon a person, Indian or white, a moral obligation, which, if he performs when of age, the court will set aside, yet this is the result of the argument of the petitioner.

In *Capps* v. *Hensley,* 23 Okla. 311, 150 Pac. 515, the court had under consideration a lease which was admittedly *void or voidable* by being executed in *direct contravention of the express provisions of Congress* being a lease of an Indian minor and not made by her guardian as required by the then existing statutes. Congress declaring a lease so made to be void. The Indian citizen died,

and the lease was held good against her heirs, and, passing on this question, the court say:

> "We believe that no one will contend that a contract such as is here involved was one that the infant could not have made after she attained her majority. If she could make it, then there is no doubt in our mind about her power to adopt it, or affirm it, should she so elect, and the same power over this property and contract which the infant would have possessed after attaining majority had she lived, on her death, could be exercised by the father to the extent of his estate after he came into possession of it. We think there can be no doubt but that had the Indian in this case survived, and had she attained her majority during the term of this contract, and had she received the money under it just as her father did, it would have amounted to an adoption or affirmance of it. This being true, the recognition of the father of the lessees whom he placed on the land, the reception from them of the rents under the contract, amounted to an adoption or affirmation of the same, and protected the lessee in his possession. This conclusion on our part necessarily results in the reversal of the judgment of the trial court."

The case of *Capps* v. *Hensley* has been frequently referred to in Oklahoma, and cited with approval both by the bench and bar of the state, having been cited by the Supreme Court proper and relied on in about at least six cases.

In *Beck* v. *Jackson*, 23 Okla. 813, 818, 101 Pac. 1109, the court, after citing *Capps* v. *Hensley* with approval, and discussing the effect of a minor Indian contract relating to land, said:

> "The contract being absolutely void, a court of equity can not breathe the breath of life into it. Nothing could give it any validity except confirmation by the minors in some manner recognized by the law, and they, instead of confirming it, are assailing it by their legally constituted guardian."

In *Schreyer* v. *Turner Flouring Mills Company*, 43 Pac. 719, the Supreme Court of Oregon say:

> "In their primary signification, there is a manifest distinction between adoption and ratification. The one signifies to take and receive as one's own that with reference to which there has existed no prior relation, either colorable or otherwise; while the other is a confirmation, approval or sanction of a previous act, or an act done in the name and behalf of the party ratifying without sufficient legal authority; that is to say: The confirmation of a voidable act."

In *McArthur* v. *Times Printing Co.*, 51 N. W. 216, the Supreme Court of Minnesota say:

> "The act of a corporation, in adopting such engagements, is not a ratification which relates back to the date of the making of the contracts by the promoter, but is, in legal effect, the making of a contract as of the date of the adoption."

In *Clough, et al.* v. *Clough*, 33 Me. 487, the court say:

> "If one acknowledges and delivers a deed which has his name and seal affixed to it, the deed is valid, no matter by whom the name and seal were affixed, no matter whether with or without the grantor's consent. The acknowledgment and delivery are acts of recognition and adoption, so distinct and emphatic that they will preclude the grantor from afterward denying that the signing and sealing were also his acts. They are his by adoption. Without delivery, the instrument has no validity or force. By our statutes, the instrument is not complete without acknowledgment. Till one or both of these acts are performed, the instrument has no more validity than a blank deed. By taking the instrument in this incomplete condition, and completing it, the grantor makes it his deed in all particulars. He adopts the signature and seal the same as he does the habendum and the covenants which were inserted by the printer on the blank. The deed is not sustained on the ground of ratification, but adoption. No matter by whom the signing and sealing were performed, or whether with or without the grantor's consent, by completing the instrument he adopts what he had previously done to it and makes it his for all particulars."

In Wald's Pollock on Contracts, 3rd ed. 620, it is said:

> "A party to an apparent agreement, which is void by reason of fundamental error, has more than one course open to him. * * * He is

entitled to treat the supposed agreement as void, and is not as a rule, prejudiced by anything he may have done in ignorance of the true state of the facts, yet, after that state of facts has come to his knowledge, he may, nevertheless, elect to treat the agreement as subsisting; or, it would be more correct to say, he may carry to execution, by the light of correct knowledge, the former intention which was frustrated by want of the elements necessary to the formation of any valid agreement. It is not that he confirms the original transaction, for there is nothing to confirm, but he enters into a new one."

So we say that Gilcrease has, by reason of permitting defendants to incur a large indebtedness for the development of the property, by the purchase back from Martin of a part of Martin's interest therein, by permitting Martin to liquidate a claim of $12,500.00 on the assumption of the validity of said contract, by signing division orders recognizing the interest of the defendants in said premises and directing the payment of large sums of money to them thus rendering the defendants and the pipe line companies responsible to him for the amount so paid by his order and direction confirmed, ratified and adopted the leases, both of February 8, 1911, and August 24, 1909 and that the effect of his acts, at least, is the same as if a new contract containing such provisions had been written and signed by him at the date of the performance of the acts above alluded to. These acts are acts of recognition and adoption so distinct and emphatic

that they preclude Mr. Gilcrease from now denying the binding force and validity of such contracts upon him, and prohibit him from seeking to set aside the judgment upholding such leases.

It is urged by counsel for petitioner, and it is stated in the opinion of the Supreme Court of Oklahoma, that *Barbre, et al.* v. *Hood*, 228 Fed. 658, holds that a deed executed by a minor Indian is incapable of ratification and affirmance, and, consequently, that the argument here advanced is opposed to the express judgment of the Circuit Court of Appeals of the Eighth Circuit. If such statement be correct, it is worthy of careful consideration in determining the weight to be attached to our argument in favor of ratification and adoption. An examination of the Barbre-Hood case, however, discloses that the Supreme Court of Oklahoma and counsel, alike, are in error as to the effect of such case. In that case, appellants and appellee each claimed under the same allottee—the appellant by a warranty deed dated April 23, 1910, when the allottee was a minor between twenty and twenty-one years of age; the appellee, by a deed from the allottee dated September 3, 1910, when he was of full age. There were no acts of ratification set up or attempted to be shown in the case. In fact, there was but a few months difference between the two deeds. The deed executed when a minor was, of course, disaffirmed by the deed executed when the allottee was an adult. It was sought to avoid the effect of this disaffirmance on

for other purposes,' is a revising act, and was intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of an act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876), and previous congressional enactment in conflict therewith on the same subject.

"Under the provisions of section 9 of the Act of Congress of May 27, 1908 (35 Stat. 312), the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, 'That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' imposed a merely personal restriction on the full-blood Indian heirs. The restriction thus imposed was simply an incapacity to convey without the approval of the proper county court similar to the disability of a minor to sell him his lands.

"Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not 'restricted lands,' within the purview of the proviso in section 6 of the act of May 27, 1908 (35 Stat. 312), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise."

It is difficult to see how, under Section 9 of the Act, restrictions on land are not imposed, and yet the Act imposes restrictions on account of minority. If the disabilities imposed, as would seem to be the holding of the Supreme Court of Oklahoma, are only

the disabilities of minority, disabilities personal in character, based on personal incapacity or disqualification, then it seems to us it must of necessity follow that a minor could deal with his lands under the Act of May 27, 1908, subject to such disabilities; that is, his dealings would be voidable but such dealings could be *vitalized by him when free from such disabilities.*

The petitioner devotes a considerable part of his brief in presenting his contention that the instrument dated February 8, 1911, is in and of itself an insufficient oil and gas mining lease. While the argument presented is, in our judgment, unsound and in our opinion the instrument of February 8, 1911, is under all the authorities a sufficient oil and gas mining lease, we do not enter into the discussion of the question as it appears to us it is purely a matter of state law involving no Federal question, and hence, will not be and cannot be reviewed by this court in this proceeding.

Respectfully submitted,

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